* Together with No. 437, U.S. v. Jaffray.

CLERK'S COPY

VOL. I

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 416

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BERTELSEN & PETERSEN ENGINEERING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 13, 1938
CERTIORARI GRANTED NOVEMBER 21, 1938

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 416

THE UNITED STATES OF AMERICA, PETITIONER

VS.

BERTELSEN & PETERSEN ENGINEERING COMPANY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Original	Print
Proceedings in U. S. C. C. A., First Circuit	1	1
Caption [omitted in printing]	1	1
Record from D. C. U. S., District of Massachusetts	1	1
Petition	1	1
Answer	5	3
Motion to Amend Answer (allowed)	6	4
Hearing	7	5
Motion for Judgment	7	5
Hearing on Motion	8	6
Motion for Rehearing (allowed)	8	6
Motion to Amend Petition	9	7
Exhibit A—Certificate of Overassessment	11	8
B—Computation of Interest	11	8
Answer to Amended Petition	12	8
Hearing	12	9
Requests for Rulings (denied)	12	9
Agreement for Entry of Judgment	16	12
Judgment	16	12
Bill of Exceptions	17	12
Statement of facts	17	12
Petitioner's requests for rulings (denied)	22	16
Findings of Fact and Rulings of Law	26	19

102192—38——1

Record from D. C. U. S., District of Massachusetts—Continued.
Bill of Exceptions—Continued.

	Original	Print
Petitioner's Exhibits:		
1—Letter, Oct. 11, 1927, Petitioner to Collector	31	23
2—Certificate of Overassessment	32	23
3—Assessment Certificate	33	24
4—Income and Profits Tax Waiver, Jan. 8, 1924	35	25
5—Same, Feb. 23, 1924	36	26
6—Same, Feb. 27, 1924	37	28
7—Same, Oct. 30, 1930	39	29
8—Letter, Sept. 16, 1925, Bright to Petitioner	40	30
9—Letter, Nash to Petitioner, Dec. 5, 1925	44	33
10—Same, Jan. 14, 1926	45	34
11—Letter, Jan. 23, 1926, Commissioner to Petitioner	47	35
12—Schedules of Overassessments, etc	49	37
13—Letter, Oct. 25, 1924, Bright to Petitioner	53	38
14—Receipt by Collector, Nov. 28, 1927	53	38
Defendant's Exhibits:		
A—Letter, Feb. 27, 1924, Heuvel to Commissioner	54	39
B—Letter, Dec. 30, 1925, Petitioner to Commissioner	54	39
Opinion of Court, Brewster, J	55	40
Petition for Appeal	63	45
Assignment of Errors	64	46
Deposit in lieu of Bond	68	49
Citation and Acceptance of Service thereof [omitted in printing]	69	49
Certificate of Clerk [omitted in printing]	70	49
Enlargement of Time for Docketing Case	70	
Clerk's certificate [omitted in printing]	71	

1 [Caption omitted.]

In United States District Court, District of Massachusetts

No. 4146 Law Docket

BERTELSEN & PETERSEN ENGINEERING CO., PLAINTIFF
v.
UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed September 19, 1929

To the HONORABLE JAMES M. MORTON, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, RESPECTFULLY REPRESENTS THE BERTELSEN & PETERSEN ENGINEERING CO., WHO ALLEGES AND SAYS:

FIRST. The petitioner herein is a corporation organized under the laws of the Commonwealth of Massachusetts, having its prin-
2 cipal place of business in Boston, Massachusetts, and is a citizen and resident of that Commonwealth.

SECOND. At all the times hereinafter mentioned the United States of America was and still is a corporation sovereign and on information and belief, at all times hereinafter mentioned, John J. Mitchell and Malcolm E. Nichols were Collectors of Internal Revenue for the District of Massachusetts with offices in the City of Boston, Commonwealth of Massachusetts. Said John J. Mitchell has died and said Malcolm E. Nichols was not at the date of filing of this petition in office as Collector of Internal Revenue but has been succeeded in said office by Thomas W. White, who now holds the same.

THIRD. This action is brought against the United States of America in the United States District Court for the District of Massachusetts, said court having jurisdiction of the matters herein complained of by the petitioner.

FOURTH. The said action is one to recover back Federal war profits taxes, excess profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally withheld from the said petitioner or erroneouly and illegally collected from the said petitioner and is an action arising out of the laws of the United States providing for internal revenue.

FIFTH. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of

have been denied or rejected by the Commissioner of Internal Revenue.

SIXTH. Petitioner duly filed with the Collector of Internal Revenue for the District of Massachusetts the income and profits tax returns for the calendar years 1917 and 1918 and the relevant dates of filing of all returns; the dates and amounts of all payments; the dates of the claims for refund; and the dates of the rejections or denials of the said claims for refund are herein detailed as follows:

3 The final 1917 return was filed on or before June 1, 1918. The final return was filed on or before June 15, 1919. There was paid on account of the 1917 original return—list page 1395—line 17—$277,586.23, and, in addition, August 1920, list page 31—line 1—$6,510.54—total $284,096.77. There was paid for 1918 list, per original return, account No. 403,152, including interest of $345.15, the sum of $242,384.72 and there was also paid August 1920 list, additional, page 32—line 2—$163.25, making a total of $242,547.97, from which when the interest for delay in filing and paying in 1919 was subtracted, there was left a tax paid of $242,202.82. Final communication was received January 23, 1926, showing overassessment for 1917 without interest of $91,570.34 and a further additional proposed assessment for 1918 of $34,555.68; to these two proposals the taxpayer entered no objection and in due course, subject to inability to pay on the part of the Treasury Department through lack of cash, the overassessment for 1917 less the additional tax for 1918 plus interest was received in the fall of 1927 undated by the collector, as per his overassessment certificate.

The taxpayer filed, and possesses acknowledged receipt of said action, refund claims for 1917 and 1918 in the amount of $34,555.68 with request for interest on November 28, 1927. These claims were rejected by letters received both in January and February 1928.

SEVENTH. The petitioner claims a refund in the sum of $34,555.68 and interest of at least 66 percent thereon in addition, based upon the following outline of events:

(a) That the Commissioner of Internal Revenue when preparing his refund or overassessment of $91,570.34 for 1917 credited same against the $34,555.68 for 1918 and returned to the taxpayer only the net difference plus interest, without ever having assessed the said additional tax for 1918.

(b) That when the taxpayer through its officer personally received the actual refund check for 1917, he immediately protested to the claims division of the Collector of Internal Revenue at Boston

4 that his corporation had not been assessed the additional tax for 1918 and that the representative of the claims division immediately acknowledged that his written records reflected that the additional tax for 1918 had never been assessed, but rather had been automatically and internally credited against the proposed overassessment or refund for 1917 in August 1926, through overassess-

ment list forwarded by the Commissioner of Internal Revenue duly executed in July 1926.

(c) That upon applying for an increase in 1917 overassessment to agree with the original amount of $91,570.34 the taxpayer was informed that waiver was filed which continued the years 1917 and 1918 open and assessable to December 31, 1925, and that further waiver was filed continuing the year 1918 open until December 31, 1926, and that the Commissioner prepared assessment list in July 1926, and hence the taxpayer was assessed legally within the statutory period.

EIGHTH. Wherefore the petitioner claims a refund of $34,555.68 for 1918, representing an amount within less than four years which has been taken out of the 1917 proposed refund and employed to pay the 1918 deficiency without having been assessed, hence claiming same as refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance. The taxpayer claims further interest from June 1918, to date of allowance by this Honorable Court on the said $34,555.68, approximating $22,000.

Wherefore the petitioner prays judgment herewith for the said sum of $34,555.68 plus interest from June 1, 1918, together with reasonable costs of this suit.

BERTELSEN & PETERSEN ENGINEERING CO.,
By M. D. BERTELSEN, *Treasurer.*

JOSEPH WIGGIN,
LISPENARD B. PHISTER,
its Attorneys.

[*Duly sworn to by M. D. Bertelsen; jurat omitted in printing.*]

5 In United States District Court

Answer

Filed October 21, 1929

Comes now the respondent in the above-entitled action and for answer to the petition filed herein admits each and every allegation in paragraphs First to Eighth, inclusive, of the said petition, except any allegation or suggestion or implication in said paragraphs, or any of them, that the assessment of $34,555.68 for 1918 was not assessed or was assessed at any other time than in July, 1926.

And further answering the respondent avers that the petitioner's final return for 1918 was sworn to on June 16, 1919, and was filed subsequent to that date; that said additional assessment of $34,555.68 was assessed on the assessment list for July 1926, page 0, line 0 [printed page 34], a certified copy of which assessment list is hereto attached as Exhibit A and by reference made a part hereof.

Wherefore, the respondent prays that the petition may be dismissed and for its costs.

By its Attorney,

FREDERICK H. TAFT,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

[Memorandum. Exhibit A referred to in said answer as attached is here omitted, it being marked also "Petitioner's Exhibit 3," and will be found printed on page 33 of this record. James S. Allen, Clerk.]

6 In United States District Court

Motion to amend answer

Filed January 15, 1931

Now comes the respondent in the above-entitled action and moves to amend its answer filed herein by adding thereto the following:

And further answering the respondent says that on January 8, 1924, the petitioner filed a waiver extending the time for assessment and collection of taxes for the year 1918 for one year from the date of said waiver. A certified copy of said waiver is hereto attached, marked "Exhibit B" and by reference made a part hereof.

And further answering the respondent says that on February 23, 1924, the petitioner filed a waiver extending the time for assessment and collection of taxes for the year 1918 for one year after the statutory period of limitation or the statutory period of limitation as extended by any waivers already on file. A certified copy of said waiver is hereto attached, marked "Exhibit C" and by reference made a part hereof.

And further answering the respondent says that on February 27, 1924, the petitioner filed a waiver extending the statutory period for assessment and collection of taxes for the year 1918 for one year from the date of said waiver. A certified copy of said waiver is hereto attached, marked "Exhibit D" and by reference made a part hereof.

And further answering the respondent says that on October 30, 1924, the petitioner filed a waiver extending the statutory period for the assessment and collection of taxes for the year 1918 for one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year 1918, or the statutory period of limitation as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau. A certified copy of said waiver is hereto attached, marked "Exhibit E" and by reference made a part hereof.

7 And further answering the respondent says that all of said waivers were signed by the Commissioner of Internal Revenue.

And further answering the respondent denies each and every material allegation, item, count and particular in the petition contained, except as specifically admitted by the respondent.

By its Attorney,

FREDERICK H. TABB,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Assented to.

JOHN W. LOWRENCE,
Attorney for the Petitioner.

BREWSTER, J. Motion allowed January 15, 1931.

Attest:

JOHN E. GILMAN, Jr., *Deputy Clerk.*

[Memorandum. Exhibit B, Exhibit C, Exhibit D, and Exhibit E, referred to in said motion to amend answer as attached, are here omitted, they being marked also "Petitioner's Exhibit 4," "Petitioner's Exhibit 5," "Petitioner's Exhibit 6," and "Petitioner's Exhibit 7," and will be found printed on pages 35 to 40 of this record. James S. Allen, Clerk.]

Recital as to hearing

On the same day said motion was allowed by the court and, issue having been joined, this cause was set down for hearing and fully heard by the court without a jury upon the issue, the Honorable Elisha H. Brewster, District Judge, sitting; on the same day the defendant filed a Motion for Judgment as follows:

In United States District Court

Motion for judgment

Filed January 15, 1931

Now comes the respondent in the above-entitled action and on the pleadings and the evidence in the above-entitled case moves
8 that judgment be entered for the respondent and against the petitioner with costs.

By its Attorney,

FREDERICK H. TABB,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Recital as to hearing

On the same day the said motion for judgment was heard by the court and the cause and the motion for judgment were taken under advisement.

In United States District Court

Motion for rehearing

Filed January 16, 1931

Now comes the petitioner in the above-entitled cause and moves that a rehearing be granted and assigns as grounds for said rehearing the following:

That late in the afternoon of the day of the hearing of this cause, James V. Giblin, Esq., the tax accountant for some years in charge of the petitioner's tax affairs, in going over his files discovered in the tax file for 1919 a duplicate original of a letter of the Treasury Department adressed to the petitioner under date of October 25, 1924, a copy whereof is hereunto attached the existence of said letter being unknown to petitioner and its counsel in the preparation and in the trial heretofore of said cause; and the petitioner calls attention to the third paragraph of said letter.

By its Attorney,

JOHN W. LOWRANCE.

IT:CA:2113-4.

OCTOBER 25, 1924.

BERTELSEN & PETERSEN ENGINEERING CO.,
256 Border Street., East Boston, Mass.

SIRS: Receipt is acknowledged of letter dated October 16, 1924, of J. A. Vanden Heuvel and Company, Washington, D. C.,
9 enclosing brief covering 1918 to 1920, prepared on behalf of your corporation.

You are advised that a conference has been arranged for 1.45 o'clock, November 21, 1924, Room 114, Treasury Annex No. 2, Fifteenth Street and Ohio Avenue, Northwest, Washington, D. C.

In view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918, and in view of the fact that the statutory period within which the Commissioner may assess additional taxes for the year 1919, will expire presently, it is requested that renewal waivers for the years 1917 and 1918, and waiver for 1919, be executed by your corporation and forwarded to this office.

Blank forms of waivers are enclosed.

Respectfully.

J. G. BRIGHT, *Deputy Commissioner.*
By ——— ——— *Chief of Section.*

Enclosures: 3 Waiver forms.

Thereafter at the same term, on January 26, 1931, the said motion for rehearing was heard by the court and was allowed.

In United States District Court

Motion to amend petition

Filed February 11, 1931

Now comes the petitioner and moves that it be allowed to amend its petition by inserting at the end of paragraph Eighth thereof and additional paragraph, "Ninth," with two exhibits, A and B, attached thereunto respectively, as follows:

NINTH. The petitioner further says that on or about the eleventh day of October, 1927, it was paid, and received under protest, the sum of $52,304.02, and was at the time of said payment, received under protest, handed by the Collector of Internal Revenue at Boston a certificate of overassessment, photostatic copy of which is attached hereunto, by reference made a part of this petition and marked "Exhibit A"; that the petitioner was at the same time paid the
10 sum of $23,115.75, as appears in said copy of said certificate of overassessment hereunto annexed marked "A"; that if the petitioner is in error in respect of its claim that the alleged additional assessment for the year 1918 in the amount of $34,555.68 was erroneous, then there was at such time, and had been from the twenty-seventh day of July 1926, due to it interest additional to the said sum of $23,115.75, as appears in said interest item in said certificate of overassessment hereunto annexed marked "Exhibit A"; that the petitioner seeks an accounting in respect of said interest, and for the assistance of the court in computing the said interest as same should be accounted for by the respondent to the petitioner, the petitioner submits herewith a computation which is hereunto annexed by reference, made a part of this petition and marked "Exhibit B"; that the petitioner says that there will be found upon accounting that there is due to it, on the basis of the accounting sought, the sum of $19,417.61, together with interest thereon from October 10, 1927, to the date of the bringing of this suit at the rate of six percent per annum.

And the petitioner moves further to amend its petition by striking out the prayer thereof and by inserting in the stead thereof the following prayer:

Wherefore, the petitioner prays that judgment be entered in its favor for the sum of $34,555.68, together with interest thereon due the petitioner in accordance with law.

And the petitioner further prays that it may have an accounting of interest due it in the premises of its transactions with the respondent as to the assessment and payment of taxes, the assessment and payment of overassessments, credits for overassessments and over-payments and/or the payment to it of interest thereon, and/or the failure and refusal of the respondent to pay interest due in the premises;

and that this court may otherwise right and justice do in the premises, and that it may have its costs.

By its Attorneys.

JOSEPH WIGGIN,
JOHN W. LOWRANCE.

11 [Memorandum. Exhibit A, referred to in said motion to amend petition as attached, is here omitted is being marked also "Petitioner's Exhibit 3" and will be found printed on page 33 of this record. James S. Allen, Clerk.]

Exhibit B to motion

If assessment of $24,555.68 is invalid, interest should be computed as follows:

Int. on $6,510.54	10/14/20–7/27/26	5 yrs. 286 days		$2,250.25
" " 28,045.14	8/8/19–7/27/26	6 " 354 "		11,728.25
" " 4,710.64	8/8/19–7/27/26	" " " "		1,969.95
" " 22,013.06	8/8/19–7/27/26	" " " "		9,205.68
" " 10,000.00	2/28/19–7/27/26	7 " 149 "		4,444.93
" " 20,290.96	6/17/18–7/27/26	8 " 40 "		9,873.08
				$39,481.14
Less interest allowed				23,115.75
Interest due to 7/27/26				$16,365.39
Int. on $91,570.34	7/27/26–10/10/27	1 yr. 75 days		6,623.17
Interest due to 10/10/27				$22,988.56
The judgment should, therefore, be for the above, plus				34,555.68
Total of judgment				$57,544.24

Judgment should carry interest from 10/10/27 to date.

If assessment of $34,555.68 is valid, interest calculation should be as follows:

After the deduction of $34,555.68 on 7/27/26, balance refundable was $52,304.02.

Int. on $52,304.02	7/27/26–10/10/27	1 yr. 75 days		$3,783.09
Interest due to 7/27/26				16,365.39
Total interest due to 10/10/27				$20,148.48

From this should be deducted interest admittedly assessed correctly of $730.87, leaving a balance due of interest of $19,417.61

12 To this amount interest should be added to the date of judgment from 10/10/27.

In United States District Court

Answer to amended petition

Filed February 16, 1931

Now comes the respondent in the above-entitled action and for its answer to the amended petition on file herein denies each and every material allegation, item, count and particular in said amended petition contained.

And further answering the respondent says that interest on the overassessment was allowed in full to the petitioner in accordance with the provisions of Section 1116 of the Revenue Act of 1926.

By its Attorney,

FREDERICK H. TABER,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to the United States Attorney.

Recital as to hearing

Thereupon on the same day, February 16, 1931, the cause was again set down for hearing and fully reheard by the court, the Honorable Elisha H. Brewster, District Judge, sitting, as aforesaid, and the following Requests for Rulings was filed by the petitioner:

In United States District Court

Requests for rulings

Filed February 16, 1931

The petitioner requests that this Honorable Court rule as follows:

1. That the waiver of February 23, 1924 (Petitioner's Exhibit 5), upon its signature and acceptance by D. H. Blair, Commissioner, supplanted and rendered null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4).

2. That the waiver of February 27, 1924 (Petitioner's Exhibit 6), upon its signature and acceptance by D. H. Blair, Commissioner, supplanted and rendered null and void the waiver of February 23, 1924 (Petitioner's Exhibit 5).

13 3. That the close proximity of the dates January 8, 1924, February 23, 1924 and February 27, 1924, upon which the three waivers (Petitioner's Exhibits 4, 5 and 6, respectively) were executed, in and of itself, taken in conjunction with the subject-matter thereof, negatives the claim of the respondent that the waivers are to be tacked on to each other, as is contended by the respondent.

4. That the close proximity of the dates January 8, 1924, February 23, 1924 and February 27, 1924, upon which the three waivers (Petitioner's Exhibits 4, 5 and 6, respectively) were executed, in and of itself affirmatively shows that the petitioner intended that the waiver of February 23, 1924 (Petitioner's Exhibit 5) should supplant the waiver of January 8, 1924 (Petitioner's Exhibit 4), and that the waiver of February 27, 1924 (Petitioner's Exhibit 6) should supplant the waiver of February 23, 1924 (Petitioner's Exhibit 5).

5. That in signing and accepting the waiver of February 23, 1924 (Petitioner's Exhibit 5) and the waiver of February 27, 1924 (Petitioner's Exhibit 6), the Commissioner, D. H. Blair, acceded to and acquiesced in the acts of the petitioner in supplanting the waiver of January 8, 1924 with the waiver of February 23, 1924,

and in supplanting the waiver of February 23, 1924 with the waiver of February 27, 1924, and the act and intention of the petitioner in respect of said transactions were manifestly known to the Commissioner.

6. That in attempting to assess the deficiency assessment of $34,555.68 the respondent purported to act under the Internal Revenue Act of 1926.

7. That the deficiency assessment of $34,555.68, if lawfully made, was made under the Internal Revenue Act of 1926.

8. That the statutory period of assessment, as extended by waiver and/or by statute, had expired prior to the alleged date of the deficiency assessment of $34,555.68 for the year 1918.

9. That the statutory period for deficiency assessment having expired, the respondent is forced in its justification of the deficiency assessment of $34,555.68 to depend upon extension thereof by waiver, and it is necessary for the respondent to elect as to whether it
14 shall stand upon the waiver of January 8, 1924 (Petitioner's Exhibit 4), the waiver of February 23, 1924 (Petitioner's Exhibit 5), or the waiver of February 27, 1924 (Petitioner's Exhibit 6), as the waiver so chosen by election may be extended by the waiver of October 30, 1924 (Petitioner's Exhibit 7).

10. That the writing by the respondent in longhand of the figures and word "1918 Expires 6/15/26" appearing on Petitioner's Exhibit 8, which bears date September 16, 1925, constitutes an admission by the respondent that it had accepted the waiver of February 23, 1924 (Petitioner's Exhibit 5) as displacing and rendering null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4).

11. That the respondent's letter to the petitioner dated October 25, 1924 (Petitioner's Exhibit 13) in and of itself shows that the respondent had, on or before the date of said letter, elected to stand upon the waiver of February 23, 1924 (Petitioner's Exhibit 5) and had treated as null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4), and had, for its own purposes, disregarded, as expiring aforetime, the waiver of February 27, 1924 (Petitioner's Exhibit 6).

12. That the respondent's letter to the petitioner dated October 25, 1924 (Petitioner's Exhibit 13) within itself constitutes an admission that the respondent had, on or before the date of said letter, elected to stand upon the waiver of February 23, 1924 (Petitioner's Exhibit 5) and had treated as null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4), and had, for its own purposes, disregarded, as expiring aforetime, the waiver of February 27, 1924 (Petitioner's Exhibit 6).

13. That the words "any waivers already on file with the Bureau", as they occur in the waiver of February 23, 1924 (Petitioner's Exhibit 5), and the waiver of October 30, 1924 (Petitioner's Exhibit 7) can only refer to waivers on file which were in force and effect at the time of filing of said waivers of February 23, 1924 and October 30, 1924, the mere physical presence of the antecedent waivers in the files of the respondent being as a matter of law insufficient.

14. That the time for the lawful making of the deficiency
15 assessment for the year 1918 cannot, by any interpretation of the law and the facts, be extended beyond June 27, 1926.

15. That if the respondent, relying on the provisions of the Act of 1926, seeks to obtain, by reason of the suspension of the operation of waivers then in force, time additional unto said waivers and this court sustains said contention of the respondent, then the period thereby gained will expire June 27, 1926.

16. That judgment should be entered in favor of the petitioner in the sum of $57,544.24, together with interest thereon from October 11, 1927 to the date of the bringing of this suit, together with interest on said sums from the date of the bringing of this suit to the date of judgment.

17. That even though this court should rule that the deficiency assessment of $34,555.68 for the year 1918 was lawful, still there is due to the petitioner, on account of interest from it unlawfully withheld, the sum of $19,417.61, together with interest thereon from October 11, 1927 to the date of the bringing of this suit, together with interest on said sums from said date of bringing of this suit to the date of judgment.

18. That even though this court should rule that the deficiency assessment of $34,555.68 for the year 1918 was lawful, still there is due to the petitioner, on account of interest from it unlawfully withheld, the sum of $15,634.52, together with interest thereon from July 27, 1926 to the date of the bringing of this suit, together with interest on said sums from said date of bringing of this suit to the date of judgment.

19. That no notice was given to the petitioner of the deficiency assessment of $34,555.68 within a reasonable time, and said deficiency assessment is by reason of the respondent's failure to give notice within a reasonable time void.

By its Attorneys,

JOSEPH WIGGIN,
JOHN W. LOWRANCE.

April 6, 1931. E. H. B.

BREWSTER, J. All of the above requests for rulings are denied.

16 This cause was thence continued under advisement to the March Term, 1931, when, to wit, April 6, 1931, all of the requests of the petitioner were denied and an opinion was announced by the court for the recovery by the petitioner from the defendant of two amounts aggregating $44.07.

Said cause was thence continued to the June Term, A. D. 1931, when, to wit, August 27, 1931, a bill of exceptions was filed by the petitioner within the extended time.

This cause was thence continued from term to term to the present December Term, 1931, when, to wit, December 2, 1931, a substitute bill of exceptions assented to is filed by the petitioner and allowed by the court.

In United States District Court

Agreement for entry of judgment

Filed December 4, 1931

Now come the parties in the above-entitled action and by their attorneys agree that judgment may be entered forthwith for the petitioner in the amount of forty-four and 07/100 dollars ($44.07), without costs.

By their Attorneys,

JOSEPH WIGGIN,
LISPENARD B. PHISTER,
JOHN W. LOWRANCE,
Attorneys for Petitioner.
FREDERICK H. TABR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorney for the Respondent.

In United States District Court

Judgment

Thereupon, to wit, December 4, 1931, it is considered by the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Bertelsen & Petersen Engineering Co., petitioner, recover from the United States of America, defendant, the sum of forty-four and $\frac{07}{100}$ dollars ($44.07), without costs.

17 In United States District Court

Petitioner's substitute bill of exceptions

Filed and Allowed December 2, 1931

Statement of facts

This is a petition by Bertelsen & Petersen Engineering Co. filed on September 19, 1929, seeking to recover the amount of a deficiency assessment of income and excess profit taxes for the calendar year 1918, in the amount of $34,555.68, which amount the petitioner alleges the Government had unlawfully assessed in July of 1926, and had collected by withholding said sum from the petitioner in repaying to it an overassessment for the year 1917, in the sum of $91,570.34.

By motion to amend its petition filed and allowed February 11, 1931, the petitioner also seeks an accounting of interest due it in

the premises of its transactions with the respondent as to the assessment and payment of taxes, etc. for the calendar years 1917 and 1918.

All requisite conditions precedent to the bringing of its petition were complied with by the petitioner.

The pleadings are a part of this record and may be referred to as a part of this bill of exceptions.

The case came on for trial before Brewster, J., on January 15, 1931 and was taken under advisement. On January 16, 1931, the petitioner filed a motion to re-open the case. Hearing was had upon plaintiff's motion to re-open the case on January 26, 1931, before Brewster, J., and the motion was allowed. On February 11, 1931, the petitioner's motion to amend its petition was filed and allowed. On February 16, 1931, the case as re-opened was heard by Brewster, J.

Both at the original hearing and at the rehearing, the case was tried solely upon the pleadings, certain documentary evidence and upon facts agreed to in open court, as hereinafter set forth, saving only that counsel for the petitioner, at the original hearing, after the introduction in evidence of the four waivers, Exhibits 4 to 7 inclusive, produced as witnesses Paul J. Bertelsen, at all times mentioned in the petition vice-president of the petitioner, and
18 James V. Giblin, Esq., at all times mentioned tax consultant to the petitioner, and, the admissibility of their testimony being challenged, made the following formal offer of proof:

That waiver No. 2 was sent in order that the year 1917 might be included, waiver No. 1 having been confined solely to taxes for the year 1918; that waiver No. 2 was not in the usual form and that waiver No. 3 was sent to correct the use of the informal waiver No. 2 and specifically embraced the two years 1917 and 1918; that the sole intent on the part of the petitioner in sending waiver No. 3 was to displace waiver No. 2 and that waiver No. 4 was given on the assumption of the petitioner that waiver No. 2 had been displaced.

This evidence was excluded and the petitioner's exception saved.

At the trial it was agreed by counsel that the taxes which the petitioner paid for the year 1917 were paid on the dates and in the amounts as follows:

$112,817.39 was paid in April 1, 1918.
$100,000.00 was paid on June 17, 1918.
$10,000.00 was paid on February 28, 1919.
$54,768.84 was paid on August 8, 1919.
$6,510.54 was paid on October 14, 1920.

There was another item paid which has been refunded and has no bearing on the issue in this case.

At the rehearing, a letter dated October 25, 1924, from the Deputy Commissioner of Internal Revenue to the plaintiff was, subject to objection and exception saved by the respondent, offered by the petitioner and was marked "Exhibit 13."

At the rehearing the respondent produced a computation of the interest previously paid to the taxpayer as follows:

STATEMENT OF INTEREST

Overassessment for 1917		$91,570.34
Additional tax for 1918	$34,555.68	
Additional tax for 1919	4,710.64	
Total against which 1917 overassessment applied as credit		39,266.32
Net amount refundable		52,304.02
19 1917 tax paid 10/14/20 credited against 1918 taxes		6,510.54
1917 tax paid 8/18/19, $54,768.84, amount credited against 1918 taxes		28,045.14
Total		34,555.68

The due date of the 1918 taxes being March 15, 1919, and the date of payment of this amount of 1917 tax being subsequent thereto, no interest is payable.

1917 tax paid 8/18/19—$54,768.84, amount credited against 1919 taxes. $4,710.64

CALCULATION OF INTEREST

Amount of tax				$4,710.64
	Mo.	Day	Year	
Due date of 1919 taxes	3	15	20	
Payment date of 1917 taxes	8	18	19	
Interest period	6 months—28 days			
Rate	3.4273 percent			
Interest paid				$161.45
Balance of 1917 taxes paid 8/18/19				$22,013.06
Date of allowance	July 27, 1926			
Date of payment	Aug. 8, 1919			
Interest period	6 yrs., 11 months, 9 days			
Rate	41.64794 percent			
Interest paid				$9,167.99
Amount of 1917 taxes and interest paid 8/8/19				$7,819.95
Date of allowance	July 27, 1926			
Date of payment	Aug. 8, 1919			
Interest period	6 yrs., 11 months, 19 days			
Rate	41.8123 percent			
Interest paid				$3,269.70
Amount of 1917 taxes paid 2/28/19				$10,000.00
20 Date of allowance	July 27, 1926			
Date of payment	Feb. 28, 1919			
Interest period	7 yrs., 4 months, 29 days			
Rate	44.47671 percent			
Interest paid				$4,447.67
Amount of 1917 taxes paid 6/17/18				$12,471.01
Date of allowance	July 27, 1926			
Date of payment	June 17, 1918			
Interest period	8 yrs., 1 month, 10 days			
Rate	48.66438 percent			
Interest paid				$6,068.94

TOTALS

	Amounts refunded	Interest
	$22,013.06	$9,167.99
	7,819.95	3,269.70
	10,000.00	4,447.67
	12,471.01	6,068.94
Total	$52,304.02	$22,954.30
Interest on $4,710.64 principal of which was credited against 1919 tax		161.45
Total interest paid		$23,115.75

Above computation of interest is in accordance with the provisions of Section 1116 of the Revenue Act of 1926.

Mr. Clark offered the following explanation of how the Government arrived at the computation of interest:

From the amount of overassessment for 1917, $91,570.34, we deduct amounts credited to additional taxes for 1918 and 1919 in the amounts of $34,555.68 and $4,710.64, respectively, or a total of $39,266.32, leaving $52,304.02, which was refunded in cash.

The last payment of the 1917 tax was $6,510.54, made October 14, 1920. The second last payment of the 1917 tax was $54,768.84, made August 18, 1919. We credit the last payment of $6,510.54 against
1918 taxes (the oldest taxes) and the second payment to
21 the extent of $28,045.14, or a total of $34,555.68 credited to 1918 taxes. No interest on the $34,555.68 was allowed.

The second oldest tax was for 1919 in the amount of $4,710.64 and this was also credited out of the second last payment of 1917 taxes of $54,768.84. The Government had the benefit of that amount from August 18, 1919, to March 15, 1920, and interest was allowed between those dates in the amount of $161.45.

The balance of $54,768.84 paid in August 1919, not used as credits, was a part of the refund of $52,304.02, and the Government had the benefit of this difference amounting to $22,013.06 until July 27, 1926, and it allowed interest in the amount of $9,167.99.

$7,819.95 was paid on account of the 1917 taxes on August 8, 1919, of which the Government had the benefit until July 27, 1926, and on which interest has been allowed in the amount of $2,369.70.

$10,000 was paid on account of 1917 taxes on February 28, 1919, of which the Government had the benefit until July 27, 1926, and on which interest has been allowed in the amount of $4,447.67.

$12,471.01 was paid on account of 1917 taxes on July 17, 1918, of which the Government had the benefit until July 27, 1926, and on which interest has been allowed in the amount of $6,068.94.

The total of these interest payments made to the plaintiff is $23,115.75.

This computation of the Government, together with Petitioner's Exhibit B attached to its amended petition, was considered by the court. Exhibit B is as follows:

Exhibit B

If assessment of $34,555.68 is invalid, interest should be computed as follows:

Int. on	$6,510.54	10/14/20–7/27/26	5	yrs.	286	days		$2,259.25
" "	28,045.14	8/8/19–7/27/26	6	"	354	"		11,728.25
" "	4,710.64	8/8/19–7/27/26	"	"	"	"		1,969.95
" "	22,013.06	8/8/19–7/27/26	"	"	"	"		9,205.68
" "	10,000.00	2/28/19–7/27/26	7	"	149	"		4,444.93
" "	20,290.96	6/17/18–7/27/26	8	"	40	"		9,873.08
								$39,481.14
22	Less interest allowed							23,115.75
	Interest due to 7/27/26							$16,365.39
Int. on $91,570.34	7/27/26–10/10/27–1 yr. 75 dys							6,623.17
	Interest due to 10/10/27							$22,988.56
The judgment should, therefore, be for the above, plus								34,555.68
	Total of judgment							$57,544.24

Judgment should carry interest from 10/10/27 to date.

If assessment of $34,555.68 is valid, interest calculation should be as follows:

After the deduction of $34,555.68 on 7/27/26, balance refundable was $52,304.02.

Int. on $52,304.02 7/27/26–10/10/27–1 yr. 75 dys		$3,783.69
Interest due to 7/27/26		16,365.39
Total interest due to 10/10/27		$20,149.48

From this should be deducted interest admittedly assessed correctly of $730.87, leaving a balance due of interest of $19,417.61.

To this amount interest should be added to the date of judgment from 10/10/27.

All exhibits, with the exception of Exhibit 13, were admitted without objection and/or by agreement.

All exhibits are by reference made a part of this bill of exceptions and may be referred to.

The foregoing constitute all the facts material to the issues raised by this record.

Petitioner's requests for rulings

In the course of the trial of the case and before arguments, the petitioner requested the court to make certain rulings of law, of which the following were denied:

1. That the waiver of February 23, 1924 (Petitioner's Exhibit 5), upon its signature and acceptance by D. M. Blair, Commissioner, supplanted and rendered null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4).

2. That the waiver of February 27, 1924 (Petitioner's Ex-
23 hibit 6), upon its signature and acceptance by D. H. Blair, Commissioner, supplanted and rendered null and void the waiver of February 23, 1924 (Petitioner's Exhibit 5).

3. That the close proximity of the dates January 8, 1924, February 23, 1924, and February 27, 1924, upon which the three waivers (Petitioner's Exhibits 4, 5, and 6, respectively) were executed, in and of itself, taken in conjunction with the subject matter thereof, negatives the claim of the respondent that the waivers are to be tacked on to each other, as is contended by the respondent.

4. That the close proximiity of the dates January 8, 1924, February 23, 1924, and February 27, 1924, upon which the three waivers (Petitioner's Exhibits 4, 5, and 6, respectively) were executed, in and of itself affirmatively shows that the petitioner intended that the waiver of February 23, 1924 (Petitioner's Exhibit 5) should support the waiver of January 8, 1924 (Petitioner's Exhibit 4), and that the waiver of February 27, 1924 (Petitioner's Exhibit 6) should supplant the waiver of February 23, 1924 (Petitioner's Exhibit 5).

5. That in signing and accepting the waiver of February 23, 1924 (Petitioner's Exhibit 5) and the waiver of February 27, 1924 (Petitioner's Exhibit 6), the Commissioner, D. H. Blair, acceded to and acquiesced in the acts of the petitioner in supplanting the waiver of January 8, 1924, with the waiver of February 23, 1924, and in supplanting the waiver of February 23, 1924, with the waiver of February 27, 1924, and the act and intention of the petitioner in respect of said transactions were manifestly known to the Commissioner.

6. That in attempting to assess the deficiency assessment of $34,555.68 the respondent purported to act under the Internal Revenue Act of 1926.

7. That the deficiency assessment of $34,555.68, if lawfully made, was made under the Internal Revenue Act of 1926.

8. That the statutory period of assessment, as extended by waiver and/or by statute, had expired prior to the alleged date of the deficiency assessment of $34,555.68 for the year 1918.

24 9. That the statutory period for deficiency assessment having expired, the respondent is forced, in its justification of the deficiency assessment of $34,555.68, to depend upon extension thereof by waiver, and it is necessary for the respondent to elect as to whether it shall stand upon the waiver of January 8, 1924 (Petitioner's Exhibit 4), the waiver of February 23, 1924 (Petitioner's Exhibit 5), or the waiver of February 27, 1924 (Petitioner's Exhibit 6), as the waiver so chosen by election may be extended by the waiver of October 30, 1924 (Petitioner's Exhibit 7).

10. That the writing by the respondent in longhand of the figures and word "1918 Expires 6/15/26" appearing on Petitioner's Exhibit 8, which bears date September 16, 1925, constitutes an admission by the respondent that it had accepted the waiver of February 23, 1924 (Petitioner's Exhibit 5) as displacing and rendering null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4).

11. That the respondent's letter to the petitioner dated October 25, 1924 (Petitioner's Exhibit 13) in and of itself shows that the respondent had, on or before the date of said letter, elected to stand upon the waiver of February 23, 1924 (Petitioner's Exhibit 5) and

had treated as null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4), and had, for its own purposes, disregarded, as expiring aforetime, the waiver of February 27, 1924 (Petitioner's Exhibit 6).

12. That the respondent's letter to the petitioner dated October 25, 1924 (Petitioner's Exhibit 13) within itself constitutes an admission that the respondent had, on or before the date of said letter, elected to stand upon the waiver of February 23, 1924 (Petitioner's Exhibit 5) and had treated as null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4), and had, for its own purposes, disregarded, as expiring aforetime, the waiver of February 27, 1924 (Petitioner's Exhibit 6).

13. That the words "any waivers already on file with the Bureau," as they occur in the waiver of February 23, 1924 (Petitioner's Exhibit 5) and the waiver of October 30, 1924 (Petitioner's Exhibit 7) can only refer to waivers on file which were in force and effect at the time of filing of said waivers of February 23, 1924, and October 30, 1924, the mere physical presence of the antecedent waivers in the files of the respondent being, as a matter of law, insufficient.

14. That the time for the lawful making of the deficiency assessment for the year 1918 cannot, by any interpretation of the law and the facts, be extended beyond June 27, 1926.

15. That if the respondent, relying on the provisions of the Act of 1926, seeks to obtain, by reason of the suspension of the operation of waivers then in force, time additional unto said waivers, and this court sustains said contention of the respondent, then the period thereby gained will expire June 27, 1926.

16. That judgment should be entered in favor of the petitioner in the sum of $57,544.24, together with interest thereon from October 11, 1927 to the date of the bringing of this suit, together with interest on said sums from the date of the bringing of this suit to the date of judgment.

17. That even though this court should rule that the deficiency assessment of $34,555.68 for the year 1918 was lawful, still there is due to the petitioner, on account of interest from it unlawfully withheld, the sum of $19,417.61, together with interest thereon from October 11, 1927 to the date of the bringing of this suit, together with interest on said sums from said date of bringing of this suit to the date of judgment.

18. That even though this court should rule that the deficiency assessment of $34,555.68 for the year 1918 was lawful, still there is due to the petitioner, on account of interest from it unlawfully withheld, the sum of $15,634.52, together with interest thereon from July 27, 1926 to the date of the bringing of this suit, together with interest on said sums from said date of bringing of this suit to the date of judgment.

19. That no notice was given to the petitioner of the deficiency assessment of $34,555.68 within a reasonable time, and said deficiency assessment is, by reason of the respondent's failure to give notice within a reasonable time, void.

The court, in an opinion handed down April 6, 1931, found
26 that the assessment of $34,555.68 was not made until July 27, 1926 following the serving of notice by the respondent of an intention to assess; that the Bureau, following the actual assessment, sent no other or further notice of the additional assessment until October 1927, when the petitioner received a certificate of overassessment respecting the tax for the year 1917 which showed that it had been credited against the additional taxes for the years 1918 and 1919, but the court ruled as a matter of law as follows:

"I do not find in either the Revenue Act of 1924 or the Revenue Act of 1926 any provision which required the Commissioner to give to the petitioner any notices other than those which appeared to have been given in this case. In other words, I find that the Commissioner complied with all the requirements of law respecting notice of the additional assessment."

The Court made the following findings of fact and ruling of law:

Findings of fact and ruling of law

"The return of 1918 income was filed on the sixteenth day of June 1919, and the period within which additional assessments could be made under statutes then extant expired on the sixteenth day of June 1924. On January 8, 1924, the taxpayer signed a waiver which extended the period within which the assessment of 1918 taxes could be made to January 8, 1925. On February 23, 1924, it signed another waiver respecting the 1917 and 1918 taxes, which operated to extend the time for assessing those taxes to January 8, 1927. On February 27, 1924, it signed a third waiver respecting the 1918 and 1917 taxes, but this waiver only operated to extend the time for one year from its date. It will be noted that this waiver was for a lesser period than the second waiver signed February 23, 1924. On October 30, 1924, the petitioner signed a fourth waiver respecting the assessment of 1918 taxes which contained the following provisions:

"'This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned,
27 or the statutory period of limitation as extended by Section 277 (b) of the Revenue Act of 1924 or by any waivers already on file with the Bureau.'

"All of these waivers were executed by the taxpayer, and the authority of the officer who signed is not questioned. They were also

signed on behalf of the United States by the Commissioner of Internal Revenue.

"It is the contention of the petitioner that the first and second waivers given under dates of January 8, 1924, and February 23, 1924, should be wholly disregarded. It is the petitioner's claim, made in argument, that the third waiver of February 27, 1924, extending the time to February 27, 1925, was given in substitution for the earlier waivers, and that the waiver of October 30, 1924, extended the time only to February 27, 1926.

"From correspondence between the petitioner and the Bureau, it appears that certain subordinates in the Internal Revenue Bureau proceeded upon an erroneous belief that the statutory period of limitation as extended would expire early in 1925. On October 24, 1924, the chief of the section wrote the petitioner asking for a renewal waiver for the years 1917 and 1918, stating that these were desirable in view of the early expiration of the waivers at present on file for these years. Presumably it was in response to the communication that the fourth waiver of October 30, 1924, was given.

"It must be conceded that if at the time when this letter was written the third waiver (that of February 27, 1924) was to be treated as the only waiver on file in the Bureau, then the period of limitation would have expired February 27, 1925, but if, as was the fact, other waivers then on file extended the time to January 8, 1926, the waiver of October 30, 1924, operated to further extend the period to January 8, 1927. Whether this statement that the waivers were presently to expire was based upon a definite understanding between the parties that the waivers of January 8, 1924, and of February 23, 1924, were to be treated as void, or whether it was due to the fact that the writer was not aware that they were on file, are matters of conjecture. Upon the evidence, it is equally probable that more
28 than one clerk in the Bureau was dealing with the taxpayer and for that reason unnecessary waivers were obtained. The fact still remains that they were all given by the taxpayer and that none of them had been withdrawn. Nor does the evidence establish any agreement that they were not to be given full force and effect as waivers duly filed with the Bureau. I must find, therefore, on the evidence that they were all on file at the time the petitioner signed the waiver of October 30, 1924, wherein it expressly assented to an extension of the time for one year beyond the statutory period of limitation as extended by any waiver already on file with the Bureau. The extent of its assent must be gathered from the writing on its behalf, and we cannot vary its terms and give it an effect as if it read 'or the statutory period as extended by one of the three waivers already on file with the Bureau.'"

The court further found and ruled as follows:

". . . I have concluded that the petitioner by its agreements extended the period of limitation to January 8, 1927.

"I find and rule that the assessment of $34,555.68 was valid and the credit to that extent of the over-payment was a proper credit."

Upon the question of interest raised by the petitioner's prayer for an accounting in respect of interest, the court found and ruled as follows:

"As to the question of interest, the credits and refund having been made subsequent to the passage of the Revenue Act of 1926, the liabilities of the defendant for interest on the over-payment must be determined with reference to the provisions of that statute. United States v. Boston Buick Co. (decided February 2, 1931); 75 L. Ed. 274.

"Section 1116 (a) of that Act is as follows:

"'Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected . . . or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or
29 refund at the rate of 6 per centum per annum from the date such tax, . . . or sum was paid to the date of the allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then to the date of the assessment of that amount.'

"The government, in the case of the credits, refused to adopt the date of the assessment as the date to which interest should be computed but adopted the due dates of the amounts against which the credits were taken and in respect of the additional tax for 1918 took March 15, 1919, as the due date and March 15, 1920, as the due date for the 1919 additional assessment. Inasmuch as the over-payments were all made subsequent to March 15, 1918, no interest was allowed on the amount credited against the additional 1918 tax, and interest on the amount credited against the 1919 additional assessment was completed only to March 15, 1920. The petitioner contends that it is entitled to have the interest computed from the dates of the over-payments to July 27, 1926, the date of the additional assessments for the years 1918 and 1919.

"The application and interpretation of section 1116 (a) has been construed by the Court of Claims in Riverside & Dan River Cotton Mills, Inc. v. United States, 37 F. (2d) 965; Graniteville Manufacturing Co. v. United States, 39 F. (2d) 746; National Equipment Co. v. United States, 39 F. (2d) 757; and that court has uniformly held that when an over-payment of taxes has been credited against a deficiency for any year prior to 1921 'interest should be allowed from the date of the over-payment to the due date of the amount against which the credit is taken, and that the words "due date" used in this section mean the date fixed by the statute for the payment of the tax, or the several instalments thereof. . . .' Riverside

& Dan River Cotton Mills, Inc. v. United States, supra (at page 969), and was met by the court in the following language:

"'Plaintiff lays much stress upon the provisions of sections
30 280 of the Revenue Act of 1924 (26 U. S. C. A. Sec. 1064 note) and 283 of the Revenue Act of 1926 (26 U. S. C. A. Sec. 1064) as showing, as it insists, that the additional assessment here involved was an assessment made under the Revenue Act of 1926, but, in our opinion, this contention is without force. The Revenue Act of 1924 repealed the Revenue Act of 1921, but provided that that act should remain in force for the assessment and collection of all taxes imposed by such Act, and the Revenue Act of 1926 repealed the Revenue Act of 1924, but contained a similar provision relating to the previous Act in force for the assessment and collection of all taxes imposed thereby. Section 280 of the Revenue Act of 1924 and section 283 of the Revenue Act of 1926 related to the procedure to be followed in the determination, assessment, and collection of deficiencies under those acts. These sections did not confer the authority to make an assessment for prior years; that authority was conferred by the prior revenue acts which were retained in force for that purpose, and it was this that Congress had in mind when it provided in section 1116 (26 U. S. C. A. Sec. 153 note) as to the payment of interest on credits in case of an additional assessment "made under" certain acts.'

"I agree with the conclusions reached by the learned court in the case of Riverside & Dan River Cotton Mills, Inc. v. United States, supra, and accept as adequate the reasons stated in the opinion. It follows, therefore, that the defendant, in computing the interest, proceeded upon a proper construction of the Act which imposed its obligations to pay interest and that the amount allowed as interest on the over-payment was substantially correct. There seems to be a slight error in computation of the interest on the second payment constituting the over-payments for 1917. The date of the payment was August 8, 1919, instead of August 18, 1919. This would entitle the petitioner to ten days' additional interest computed upon $4,710.64 credited against the 1919 taxes and upon $22,013.06, the balance of the refunded over-payment of 1917 taxes made Au-
gust 8, 1919. Ten days' interest on these two amounts
31 would aggregate $44.07, for which amount the petitioner is entitled to recover."

The foregoing constitute all of the facts material to the issues raised by these pleadings.

The petitioner, being aggrieved

(1) By the exclusion of the aforesaid oral evidence as set forth in the aforesaid offer of proof, and

(2) By the refusal of the court to grant the aforesaid rulings of law requested by the petitioner, and

(3) By the aforesaid findings and rulings of the court, now excepts to the refusal of the court to admit the aforesaid parole evidence and to the refusal of the court to grant the said requests for rulings, and to the findings and rulings of the court on matters

of law, and therefore brings this its bill of exceptions and prays that it may be allowed.

By its Attorneys.

JOSEPH WIGGIN,
JOHN W. LOWRANCE,
LISPENARD B. PHISTER.

December 2, 1931. Allowed.

E. H. B., *D. J.*

Assented to.

FREDERICK H. TARR,
United States Attorney,
By J. DUKE SMITH,
Special Assistant to the United States Attorney,
Attorney for Respondent.

EXHIBITS

Petitioner's exhibit 1

[On printed letterhead of Bertelsen & Petersen Engineering Company]

EAST BOSTON, MASSACHUSETTS, *October 11, 1927.*

COLLECTOR OF INTERNAL REVENUE,
Park Square Bldg., Boston, Mass.

DEAR SIR: This is to acknowledge receipt of your check for $87,119.59, which is absolutely accepted under protest, inas-
32 much as you have applied an outlawed tax for 1918 against our legally allowable refund.

Very truly yours,

BERTELSEN & PETERSEN ENGINEERING CO.
By

Original of this letter rec'd 10/11/27

THOMAS W. WHITE, *Collector.*
By J. H. RUSSELL, *Deputy.*

Petitioner's exhibit 2

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington.

Income Tax Unit IT:R:CC–

CERTIFICATE OF OVERASSESSMENT

Number: 452133. Allowed: $91,570.34. Schedule No. 21448.

BERTELSEN AND PETERSEN ENGINEERING CO.,
256 Border Street., East Boston, Massachusetts.

SIRS: An audit of your income tax return, Forms 1031 and 1103, and a consideration of all the claims (if any) filed by you for the

year 1917 indicates that the tax assessed for this year was in excess of the amount due:

Tax previously assessed:	
Original, Account #1752847, April 1918, List, Page 1395, Line 17	$277,586.25
Additional, August 1920, List, Page 13, Line 1	6,510.54
Total tax assessed	284,096.77
Total tax due	192,526.43
Overassessment	91,570.34

In a Bureau letter of recent date, you were advised of the amount and manner of establishing your correct tax liability which resulted in the above computation.

The amount of the overassessment will be abated, credited, or
33 refunded as indicated below. (You will be relieved from the payment of any amount abated: if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By I. F. ENES,
Head of Division.

Abated: $
Credited: $34555.68 $4710.64.
Year: 1918A 1919A.
Account No. July 1926 O–OC Mar. 1925 P 1 L7C.
Refunded: $52304.02.
Interest: $23115.75.
Instructions executed. Signature, T. W. White, Collector. Int. Rev., District Mass.
JHR.

Petitioner's exhibit 3

EXHIBIT A

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington, October 10, 1929.

Pursuant to Section 882 of the Revised Statutes, I hereby certify that the annexed are true copies of Assessment Certificate and that portion of the July 1926, No. 1, income tax assessment list—Massachusetts collection district—showing an additional assessment of $34,555.68 and interest in the amount of $730.87 for 1918, against Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, the originals of which are on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

34 By direction of the Secretary:

[SEAL]

F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H. C. C. JP WWB EF• F.F.T. CMC.

ASSESSMENT CERTIFICATE COMMISSIONER'S ASSESSMENT LIST

District of Massachusetts, month July, No. 1	Year, 1926
Additional Assessments made by Commissioner:	
Personal	$25 127 31
Corporation	434 000 23
Total Assessments	459 127 54

I hereby certify that I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the amounts of taxes, penalties, etc., stated as corrected and as specified in the supplementary pages of this list made by me are due from the individuals, firms, and corporations opposite whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Dated at Washington, D. C.

C. R. NASH,
Acting Commissioner of Internal Revenue.

Office of Commissioner of Internal Revenue, Jul 3, 1926.

WWS CRN JG. WS

WP Assessment List. Page No. 0

District Massachusetts Income Tax July 1926, No. 1

Bertelsen & Peterson Engineering Co., 256, 264 Border St., East Boston, Mass., July 00, C No. 1.

Debit	$34,555.68
Int	730.87
New Balance	35,286.55

Remarks 1918 403152 RAR Waiver OL 1/23/26 0 Cla $730.87 #999681-2.

[Stamped:]

Collector, withhold demand pending comparison with 1917 over-assessment

35 *Petitioner's Exhibit 4*

EXHIBIT B

UNITED STATES OF AMERICA,

TREASURY DEPARTMENT,

Washington, December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy

of Income and Profits Tax Waiver for 1918, dated January 8, 1924, filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H. C. C. Rms W W B amr R E. S. C M. C. B
IT:C A M S 2505 P E W. App.

JANUARY 8, 1924.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Bertelsen & Petersen Engineering Co. of East Boston, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Corporation for the years 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect for one year from the date it is signed by the taxpayer.

BERTELSEN & PETERSEN ENGINEERING CO.,
Taxpayer.

[SEAL] By JENS BERTELSEN, *President.*

D. H. BLAIR, *Commissioner.*

36 If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[Stamped:]

Received Feb 14, 1925. Special Assessment Section

Petitioner's Exhibit 5

EXHIBIT C

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington, December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of

the United States), I hereby certify that the annexed is a true copy of Income and Profits Tax waiver for 1916–1917 renewed, dated February 23, 1924, filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL] F. A. BIRGFELD,

Chief Clerk, Treasury Department. B.

H. H. C. Rms W W B amr R. E. S. C. M. C.

IT:C A M S 2505-PEW-App.

FEBRUARY 23, 1924.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Bertelsen & Petersen Eng. Co. of East Boston, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due under return made by or on behalf of the said Taxpayer for the years 1918–1917,
37 Renewed under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

BERTELSEN & PETERSEN ENG. CO.,
Taxpayer.

[SEAL] By PAUL J. BERTELSEN, *Vice-Pres.*

D. A. BLAIR, *Commissioner.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of corporation must be affixed.

[Stamped:]

Received Feb 14 1925 Special Assessment Section

Petitioner's exhibit 6

EXHIBIT D

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Income and Profits Tax waiver for 1918 (1917 extended), dated February 21, 1924, filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

38 By direction of the Secretary of the Treasury:
[SEAL] F. A. BIRCHFIELD,
Chief Clerk, Treasury Department. B.

H. H. C. Rms W W Bamr R. E. S. C. M. C. B

I T:C A:M S 2506-PEW-App.

FEBRUARY 27, 1924.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921 Bertelsen & Petersen Engineering Co of East Boston, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said corporation for the years 1918 (1917 extended) under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909. This waiver is in effect for one year from the date it is signed by taxpayer.

BERTELSEN & PETERSEN ENGINEERING CO.,
Taxpayer.

[SEAL] By JENS BERTELSEN, *Pres.*
D. H. BLAIR, *Commissioner.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered

under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[Stamped:]

Received Feb 14 1925 Special Assessment Section

29 *Petitioner's exhibit 7*

EXHIBIT E

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington, December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Income and Profits Tax Waiver for 1918, dated October 30, 1924, filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL]

F. A. BIRDSELL,
Chief Clerk, Treasury Department.

H. C. C. Rms W W Bamr R. E. S. C. M. C. B

IT:2113:4

OCTOBER 30, 1930.

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of existing Internal Revenue Laws, Bertelsen & Petersen Engineering Company a taxpayer, of 256 Border St., East Boston, Mass., and the Commissioner of Internal Revenue, hereby consent to extend the period prescribed by law for a determination, assessment, and collection of the amount of income excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918 under the Revenue Act of 1924, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the
40 Statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the

statutory period of limitation as extended by Section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau.

BERTELSEN & PETERSEN ENG. CO.,
Taxpayer.

[SEAL] PAUL J. BERTELSEN, *Vice Pres.*

D. H. BLAIR, *Commissioner.*

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[Stamped:]

Received Feb. 14 1925 Special Assessment Section

Petitioner's exhibit 8

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated September 16, 1925 (with statement attached, minus Agreement (Form A) mentioned therein), to Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, from J. G. Bright, Deputy Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL] F. A. BIRDSEYE,
Chief Clerk, Treasury Department.

H. C. C. Rms W W Bmr R. E. S. C. M. C. B

41

TREASURY DEPARTMENT,
Washington.

Office of Commissioner of Internal Revenue

Address reply to Commissioner of Internal Revenue and refer to IT:E:SH SBD-10443 A-5983

BARTELSEN AND PETERSEN ENGINEERING COMPANY,
East Boston, Massachusetts.

SIRS: An audit of your income and profits tax returns for the years 1917 and 1918 has resulted in the determination of a deficiency

in tax of $34,555.68 for the year 1918, and an overassessment for the year 1917 of $91,570.34, as shown in the attached statement.

You are granted 30 days from the date of this letter within which to present a protest, supported by additional evidence or brief, against this determination of a deficiency. Any additional evidence submitted should be under oath. Upon request submitted within the period mentioned, you will also be granted a hearing in the Bureau with reference to the matter.

A request for a hearing should contain (a) the name and address of the taxpayer; (b) in the case of a corporation, the name of the State of incorporation; (c) a designation by date and symbol of the notice or notices with respect to which the hearing is desired; (d) a designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings of the Unit to which the taxpayer takes exception; and (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception.

If, after consideration of any additional evidence submitted and any arguments advanced by you, a deficiency is finally determined by the Bureau to be due from you, you will, in accordance with the provisions of Section 274 of the Revenue Act of 1924, be advised by registered mail of the final determination of the Commissioner as to the amount of the deficiency, and allowed 60 days from the mailing of the letter in which to file an appeal to the United States Board of Tax Appeals in the event you do not acquiesce in such final determination.

42 If you acquiesce in the determination of a deficiency as disclosed in this letter and the accompanying statements, you are requested to sign the inclosed agreement consenting to the assessment of such deficiency, and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SH-SBD-10443 A-5983. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

1918 Expires 6/15/26
Inclosures: Statements Agreement—Form A.
S. B. D. 5/29/25 P A S D 5/29/25 H E W 6MN F E B 6/1/25
IFE 6/5/25 BRC 8/29/25 AHD 9/8/25

[Stamped: Sep. 16 1925]

STATEMENT

IT:E:SM SBD-10443 A-5983

In re: Bertelsen and Petersen Engineering Co., East Boston, Massachusetts

Year	Deficiency in Tax	Overassessment
1917		$91,570.34
1918	$34,555.68	

Net Overassessment $57,014.66

You are advised that after careful consideration and review, your application under the provisions of Sections 210 and 327 for assessment of your profits tax as prescribed by Sections 210 and 328 of the Revenue Acts of 1917 and 1918, respectively, has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which, in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

43 1917

NET INCOME

Net income shown by field investigation	$432,711.71

COMPUTATION OF TAX

Excess profits tax (Section 210)		$177,195.45
Net income as above	$432,711.71	
Less: Excess profits tax	177,195.45	
Amount taxable at 2%	$255,516.26	5,110.33
Amount taxable at 4%	$255,516.26	10,220.65
Total tax assessable		$192,526.43
Tax previously assessed:		
Original, Account No. 1752847, April 1918, List, Page 1396, Line 17		$277,586.23
Additional, August 1920, List, Page 31, Line 1		6,510.54
Total tax assessed		$284,096.77
Total tax due		192,526.43
Overassessment		$91,570.34

In re: Bertelsen and Petersen Engineering Co.

In accordance with the above conclusions, your claims for the refund of $46,715.09 and $75,000.00, aggregating $121,715.09, will be rejected for $30,144.75.

1918

Net income shown in Bureau letter dated December 23, 1924			$390,389.29
COMPUTATION OF TAX			
Profits Tax (Section 328)			$260,306.85
Net income as above		$390,389.29	
Less:			
Profits tax	$260,306.85		
Exemption	2,000.00	262,306.85	
Amount taxable at 12%		$137,080.44	16,449.65
Total tax assessable			$276,756.50
44			
Tax previously assessed:			
Original, Account No. 403152		$242,384.72	
Less:			
Interest		345.15	
		$242,039.57	
Additional, August 1930, List, Page 31, Line 2		163.25	242,202.82
Deficiency in Tax			$34,553.68

In accordance with the above conclusions, your claims for the refund of $51,173.57 and $75,000.00, aggregating $126,173.57, will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

Petitioner's exhibit 9

UNITED STATES OF AMERICA, TREASURY DEPARTMENT,
Washington, December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated December 5, 1925 (minus enclosure mentioned therein), to Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, from C. R. Nash, Assistant to the Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL] F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H. C. C. Rms W W Bamr R E. S. C M. C. B

BERTELSEN AND PETERSEN ENGINEERING COMPANY,
East Boston, Massachusetts.

SIRS: Reference is made to your income and profits tax return for the year ended December 31, 1918, and to your protest against the rate allowed in the assessment of your profits tax under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated September 16, 1925.

Your protest is now under consideration, and you will be advised of the final determination of the tax liability at the earliest practicable date.

However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver.

In your letter of transmittal, please refer to IT:E:SM, SBD–A-5983.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By
Acting Chief of Section.

S. B. D. 12/5/25 P. A. SD 12/5/25 Hew 12/5/25

[Stamped: Mailed Dec. 5, 1925]

Petitioner's exhibit 10

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington, December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a
46 true copy of copy of letter dated January 14, 1926, to Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, from C. R. Nash, Assistant to the Commissioner, on file in the Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL] F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H. C. C. Rms. W. W. Bamr. R. E. S. C. M. C.

IT:E:S M S B D-10443 A-5983

BERTELSEN AND PETERSEN ENGINEERING COMPANY,
256 Border Street, East Boston, Mass.

SIRS: Receipt is acknowledged of your letter dated December 30, 1925, wherein you state that you accept the adjustment indicated in Bureau letter dated September 16, 1925, for the year 1917, resulting in an overassessment of $91,570.34 and request that the 1917 case be closed without waiting for the final determination of your tax liability for the year 1918.

You are advised that this office is unable to comply with you request for the reason that any additional tax which may be found to be due for the year 1918 will be offset against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time.

Any further communication relative to this case should bear the symbols IT:E:SM-SBD-10443, A-5983.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By
Acting Chief of Section.

S. B. D. 1/11/26 P. A. S. D. 1/11/26 Hawk 1/13/26 W. A. J. 1/13/26

[Stamped: Jan. 14, 1926]

47 *Petitioner's exhibit 11*

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
Washington, December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of copy of letter dated January 23, 1926 (with statement attached, minus Agreement (Form A) mentioned therein), to Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, from D. H. Blair, Commissioner, on file in this Department.

In witness whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[SEAL] F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H. C. C. Rms W M Bamr R. E. S. C. M. C. S W W

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Jan. 23, 1926.

IT:E:SM-60D SBD-10443 A-5983

Extension letter 283-C—mailed 3/20/26

BERTELSEN AND PETERSEN ENGINEERING COMPANY,
East Boston, Massachusetts.

Sirs: An audit of your income and profits tax returns for the years 1917 and 1918 has resulted in the determination of a deficiency in tax of $34,555.68 for the year 1918 and an over-assessment for the year 1917 of $91,570.34, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Wash-
48 ington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:E:SM-60D SBD-10443 A-5983. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR,
Commissioner.
By C. R. NASH,
Assistant to the Commissioner.

Inclosures: Statements Agreement—Form A AB-1.

S. B. D. 1/16/26 P A S (D) 1/16/26 A T W 1/18/26 P E W 1-18-26

STATEMENT

IT:E:SM:60D SBD-10443 A-5983

In re: Bertelsen and Petersen Engineering Company, East Boston, Massachusetts

Years Examined	Deficiency in Tax	Overassessment
1917		$91,570.34
1918	$34,555.68	

Net overassessment $57,014.66

Reference is made to your protest dated October 15, 1925, and to supplemental brief filed October 28, 1925, against the allowance of your application for assessment of your profits tax for the year 1918 under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated September 16, 1925.

49 After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that the Bureau holds that the allowance of your application is based on a comparison with representative concerns, similarly circumstanced, as nearly as may be, to your company. Accordingly, the conclusions set forth in the above-mentioned letter are sustained.

In addition to the rejection of the claims referred to in Bureau letter dated September 16, 1925, your two claims for the refund of $40,000.00 each, for the years 1917 and 1918, respectively, will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

The right of appeal to the United States Board of Tax Appeals as indicated on page one of this letter, refers only to any deficiency in tax indicated herein, inasmuch as there is no provision in the Revenue Act of 1924 granting the right of appeal against the determination of any overassessment found upon any audit of your returns.

A copy of this letter is being forwarded to your representative, Mr. J. A. Vanden Heuvel, 203-205 Metropolitan Bank Building, Washington, D. C.

Petitioner's exhibit 12

UNITED STATES OF AMERICA,
GENERAL ACCOUNTING OFFICE.

Pursuant to the Act of June 10, 1921, 42 Stat. 24, I hereby certify that the annexed documents, numbered B-1, B-2 and B-3, are true copies of the official documents now on file in the General Ac-

counting office in the following case: Bertelsen & Petersen Engineering Company *v.* United States.

In witness whereof, I have hereunto set my hand and caused
50 the seal of the General Accounting Office to be affixed this 8th day of November, in the year 1930, at Washington.

[SEAL] JUSTIN R. GINN,
Assistant Comptroller General of the United States.

53 *Petitioner's exhibit 13*

IT:CA:2113-4 OCT. 25, 1924.

BERTELSEN & PETERSEN ENGINEERING CO.,
254 Border St., East Boston, Mass.

SIRS: Receipt is acknowledged of letter dated October 16, 1924, of J. A. Vanden Heuvel and Company, Washington, D. C., enclosing brief covering 1918 to 1920, prepared on behalf of your corporation.

You are advised that a conference has been arranged for 1:45 o'clock, November 21, 1924, Room 114, Treasury Annex No. 2, Fifteenth Street and Ohio Avenue, Northeast, Washington, D. C.

In view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918, and in view of the fact that the statutory period within which the Commissioner may assess additional taxes for the year 1919, will expire presently, it is requested that renewal waivers for the years 1917 and 1918, and waiver for 1919, be executed by your corporation and forwarded to this office.

Blank form of waivers are enclosed.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.
By
Chief of Section.

Enclosures:
3 waiver forms.

Petitioner's exhibit 14

BOSTON, MASS., *November 28, 1927.*

Received today from James V. Giblin Company, 456 Park Square Building, Boston, Mass., Refund Claims of Bertelsen and Petersen Engineering Co., 256 Border Street, East Boston, Mass., as follows:

54

Year	Amount
1917 January to December	$34,555.68, plus such larger amount as may result, plus interest.
1918 January to December	$34,555.68, plus such larger amount as may result, plus interest.

THOMAS W. WHITE, *Collector.*
By V. H. LEWIS, *Dep. Coll.*

Defendant's exhibit A

J. A. VANDEN HEUVEL & Co.,
203–205 METROPOLITAN BANK BUILDING,
Washington, D. C., February 27, 1924

COMMISSIONER OF INTERNAL REVENUE, *Washington, D. C.*

SIR: Herewith I hand you a Waiver for year 1918–1917 renewed prepared on behalf of Bertelsen & Petersen Eng. Company of East Boston, Mass. File reference IT:CA:Ms-2505-PEW-App.

Respectfully,

J. A. VANDEN HEUVEL,
Agent for Taxpayer.

Received by:
[In lead pencil: Waiver 1917–1918 for Sig 2/27/24]
[On back:]
1917 to go to E. SM
1918 to go to Proving tomorrow 2/28/24
1919 & 1920—A-2 2/11/24

Defendant's exhibit B

[In lead pencil: Diamondsten]

[On letterhead of Bertelsen & Petersen Engineering Company]

EAST BOSTON, MASSACHUSETTS, *Dec. 30, 1925.*

COMMISSIONER OF INTERNAL REVENUE, *U. S. Treasury Department, Washington, D. C.*

Re: 1917 Overpayment $91,570.34—It:E:SM-SBD–1043-A-5983

SIR: In accordance with Department letter under date of September 16th, 1925, the following adjustment was set forth with respect to our tax liability for the years 1917 and 1918:

	Year	Deficiency in Tax	Overassessment
55	1917		$91,570.34
	1918	$34,555.68	

As set forth in our brief now on file for your consideration the only year under protest is 1918, we having accepted the adjustment indicated in the foregoing for the taxable year 1917.

Accordingly, therefore, we would respectfully request that the year 1917 be closed at this time without waiting for a final determination of our tax liability for the subsequent year.

Your favorable consideration in this matter would prove of great benefit to our corporation, especially at the present time.

Respectfully yours,

BERTELSEN & PETERSEN ENG. CO.
J. BERTELSEN, *President*

JB/LAW

[Stamped:]

Received Jan. 8, 1926. Special Assessment Section

In United States District Court

Opinion

April 6, 1931

[Published Fed. 2d, .]

BREWSTER, *J.* In its petition and amended petition the petitioner seeks to recover (a) the balance of an over-payment of 1917 income and profits tax, and (b) an additional sum claimed to be due for interest.

The over-payment of the 1917 tax was in part credited against an additional assessment for the year 1918 and an additional assessment for the year 1919. The validity of the additional assessment for the year 1918 is attacked on two grounds:

FIRST: That the petitioner received no notice of the deficiency as prescribed by law; and

SECOND: That it was not made within the period of limitation as extended by the taxpayer's agreements.

The first ground is readily disposed of on the facts of the case.

The determination of the deficiency in the amount of the 1918 tax was made subsequent to the effective date of the Revenue Act of 1924. This Act provided (Sec. 280) that "If after the en-
56 actment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the . . . Revenue Act of 1918, . . . the amount which should be assessed . . . shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations . . . as in the case of the taxes imposed by this title. . . ."

On September 16, 1925, the deputy commissioner sent a notice to the petitioner that an audit of its income and profit tax return for the year 1918 had resulted in a determination of a deficiency of $34,555.68 in the tax for the year 1918, and that if, after consideration of additional evidence in case of a protest, a deficiency was finally determined by the Bureau to be due from the taxpayer, a notice would be sent under the provisions of Section 274 of the Revenue Act of 1924. On January 23, 1926, a notice was sent in accordance with the provisions of said Section 274 (a). This section gave the taxpayer 60 days within which to file an appeal with the Board of Tax Appeals. Before the expiration of this 60-day period the Revenue Act of 1926 was enacted and, no appeal having been filed, the case came under Section 283 (c) of the Act, which provided as follows:

"If before the enactment of this Act the Commissioner has mailed to any person a notice under subdivision (a) of section 274 of the Revenue Act of 1924 (whether in respect of a tax imposed by Title II of such Act or in respect of so much of an income, war-profits, or excess-profits tax imposed by any of the prior acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and if the 60-day period referred to in such subdivision has not expired before the enactment of this Act and no appeal has been filed before the enactment of this Act, such person may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in the tax imposed by this title. In such cases the 60-
57 day period referred to in subdivision (a) of section 274 of this Act shall begin on the date of the enactment of this Act, and the powers, duties, rights, and privileges of the Commissioner and of the person entitled to file the petition, and the jurisdiction of the Board and of the courts, shall, whether or not the petition is filed, be determined and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section."

Subdivision (a) of Section 283 provided in substance that the amount of the tax should be determined as if the Act had not passed, but that it should be assessed, collected and paid in the same manner and subject to the provisions and limitations of the Act of 1926.

The above quoted section (283 (c)) operated to extend the time within which an appeal could be filed to 60 days after February 26, 1926, the effective date of the Act, and during this period no assessment of the deficiency could be made. (Revenue Act of 1926, Section 274 (a).)

It appears to be conceded that the assessment was not actually made until July 27, 1926. The Bureau sent no other or further notice of the additional assessment until October 1927, when the petitioner received a certificate of overassessment respecting the tax for the year 1917, which showed that it had been credited against the additional taxes for the years 1918 and 1919.

I do not find in either the Revenue Act of 1924 or the Revenue Act of 1926 any provision which required the Commissioner to give to the petitioner any notices other than those which appeared to have been given in this case. In other words, I find that the Commissioner complied with all the requirements of law respecting notice of the additional assessment.

The more difficult question is whether the assessment of an additional tax for the year 1918 was made within the period of limitation as extended by written waivers on file in the Bureau.

The return of 1918 income was filed on the sixteenth day of June 1919, and the period within which additional assessments could be made under statutes than extant expired on the
58 sixteenth day of June 1924. On January 8, 1924, the taxpayer signed a waiver which extended the period within which the

assessment of 1918 taxes could be made to January 8, 1925. On February 23, 1924, it signed another waiver respecting the 1917 and 1918 taxes, which operated to extend the time for assessing these taxes to January 8, 1926. On February 27, 1924, it signed a third waiver respecting the 1918 and 1917 taxes, but this waiver only operated to extend the time for one year from its date. It will be noted that this waiver was for a lesser period than the second waiver signed February 23, 1924. On October 30, 1924, the petitioner signed a fourth waiver respecting the assessment of 1918 taxes which contained the following provisions:

"This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation within which assessments of taxes may be made for the year or years mentioned, or the statutory period of limitation as extended by Section 277 (b, of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

All of these waivers were executed by the taxpayer and the authority of the officer who signed is not questioned. They were also signed on behalf of the United States by the Commissioner of Internal Revenue.

It is the contention of the petitioner that the first and second waivers given under dates of January 8, 1924 and February 23, 1924, should be wholly disregarded. It is the petitioner's claim, made in argument, that the third waiver of February 27, 1924, extending the time to February 27, 1925, was given in substitution for the earlier waivers and that the waiver of October 30, 1924, extended the time only to February 27, 1926.

From correspondence between the petitioner and the Bureau, it appears that certain subordinates in the Internal Revenue Bureau proceeded upon an erroneous belief that the statutory period of limitation as extended would expire early in 1925. On October 24, 1924, the chief of the section wrote the petitioner asking for a renewal waiver for the years 1917 and 1918, stating that these were desirable in view of the early expiration of the waivers at present on file for these years. Presumably it was in response to this communication that the fourth waiver of October 30, 1924, was given.

It must be conceded that if at the time when this letter was written the third waiver (that of February 27, 1924) was to be treated as the only waiver on file in the Bureau, then the period of limitation would have expired February 27, 1925, but if, as was the fact, other waivers then on file extended the time to January 8, 1926, the waiver of October 30, 1924, operated to further extend the period to January 8, 1927. Whether this statement that the waivers were presently to expire was based upon a definite understanding between the parties that the waivers of January 8, 1924, and of February 23, 1924, were to be treated as void, or whether it was due to the fact that the writer was not aware that they were

on file, are matters of conjecture. Upon the evidence, it is equally probable that more than one clerk in the Bureau was dealing with the taxpayer and for that reason unnecessary waivers were obtained. The fact still remains that they were all given by the taxpayer and that none of them had been withdrawn. Nor does the evidence establish any agreement that they were not to be given full force and effect as waivers duly filed with the Bureau. I must find, therefore, on the evidence that they were all on file at the time the petitioner signed the waiver of October 30, 1924, wherein it expressly assented to an extension of the time for one year beyond the statutory period of limitation as extended by any waiver already on file with the Bureau. The extent of its assent must be gathered from the writing signed on its behalf, and we cannot vary its terms and give it an effect as if it read "or the statutory period as extended by one of the three waivers already on file with the Bureau."

The government contends that even if the waiver of February 23, 1924, be wholly disregarded, then the other waivers together with the statutory provisions suspending the running of the statute of limitations carry the period beyond July 1926. It has already appeared that if the waiver of February 23, 1924, is to be eliminated from consideration, then the taxpayer had assented in the other waivers to an extension of the period of limitation to February 27, 1926. Section 277 (b) of the Revenue Act of 1916, suspended the running of the statute of limitation during the period in which the commissioner was prohibited from making the assessment and for 60 days thereafter.

In the case at bar, the running of the statute of limitation was suspended January 23, 1926, which was 35 days prior to the expiration of the period as extended, according to the contention of the petitioner. This suspension continued, according to sections 277 (b) and 283 (c), until 120 days after February 26, 1926, or to June 26, 1926, with 35 days of the extended time still to run. It is argued by the Government that these 35 days should be added to the 120 days, which would bring the expiration of the period to beyond the twenty-seventh day of July, when the assessment was made. I am unable to adopt the views of the Government on this point. I believe that if the taxpayer had assented to an extension of the period of limitation only to February 27, 1926, the assessment to be valid must have been made within 120 days from the effective date of the Revenue Act of 1926. It is true that before this extended period had expired the statute of limitation was suspended, and an assessment made before that period of suspension had expired would have been valid, but if at the expiration of that 120 days the period of limitation, as extended by agreement, had also expired, any assessment made thereafter would be too late.

This question, however, becomes moot inasmuch as I have concluded that the petitioner by its agreements extended the period of limitation to January 8, 1927.

I find and rule that the assessment of $34,555.68 was valid and the credit to that extent of the overpayment was a proper credit.

As to the question of interest, the credits and refund having been made subsequent to the passage of the Revenue Act of 1926, the liabilities of the defendant for interest on the over-payment must be determined with reference to the provisions of that stat-
61 ute. *United States* v. *Boston Buick Co.* (decided February 2, 1931); 75 L. Ed. 274.

Section 1116 (a) of that Act is as follows:

"Upon the allowance of a credit or refund of any internal-revenue tax erroneously or illegally assessed or collected . . . or of any sum which was excessive or in any manner wrongfully collected, interest shall be allowed and paid on the amount of such credit or refund at the rate of 6 per centum per annum from the date such tax, . . . or sum was paid to the date of allowance of the refund, or in the case of a credit, to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act then to the date of the assessment of that amount."

The government, in the case of the credits, refused to adopt the date of the assessment as the date to which interest should be computed but adopted the due dates of the amounts against which the credits were taken and in respect of the additional tax for 1918 took March 15, 1919, as the due date and March 15, 1920, as the due date for the 1919 additional assessment. Inasmuch as the over-payments were all made subsequent to March 15, 1918, no interest was allowed on the amount credited against the additional 1918 tax, and interest on the amount credited against the 1919 additional assessment was computed only to March 15, 1920. The petitioner contends that it is entitled to have the interest computed from the dates of the over-payments to July 27, 1926, the date of the additional assessments for the years 1918 and 1919.

The application and interpretation of Section 1116 (a) has been construed by the Court of Claims in Riverside & Dam River Cotton Mills, Inc. v. United States, 37 F. (2d) 965; Graniteville Manufacturing Co. v. United States, 39 F. (2d) 746; National Equipment Co. v. United States, 39 F. (2d) 757; and that Court has uniformly held that when an over-payment of taxes has been credited
62 against a deficiency for any year prior to 1921 "interest should be allowed from the date of the over-payment to the due date of the amount against which the credit is taken, and that the words 'due date' used in this section mean the date fixed by the statute for the payment of the tax, or the several instalments thereof; . . ." Riverside & Dam River Cotton Mills, Inc. v United States, at page 968.

Counsel calls attention to the language of section 1116 (a) to the effect that if the amount against which the credit is taken is an additional assessment made under the Revenue Act of 1921, the Revenue Act of 1924, or this Act, then the interest is to be computed to the date of the assessment and argues that in the case at bar the

additional assessment was made under the Act of 1926. This same argument was advanced in Riverside & Dam River Cotton Mills, Inc. v. United States, supra (at page 969) and was met by the court in the following language:

"Plaintiff lays much stress upon the provisions of sections 280 of the Revenue Act of 1924 (16 U. S. C. A., Sec 1064 note) and 283 of the Revenue Act of 1926 (26 U. S. C. A., Sec. 1064), as showing, as it insists, that the additional assessment here involved was an assessment made under the Revenue Act of 1926, but, in our opinion, this contention is without force. The Revenue Act of 1924 repealed the Revenue Act of 1921, but provided that that act should remain in force for the assessment and collection of all taxes imposed by such act, and the Revenue Act of 1926 repealed the Revenue Act of 1924, but contained a similar provision relating to the previous act in force for the assessment and collection of all taxes imposed thereby. Section 280 of the Revenue Act of 1924 and section 283 of the Revenue Act of 1926 related to the procedure to be followed in the determination, assessment, and collection of deficiencies under those acts. These sections did not confer the authority to make an assessment for prior years; that authority was conferred by the prior revenue acts which were retained in force for that purpose, and it was
63 this that Congress had in mind when it provided in section 1116 (26 U. S. C. A. Sec. 153 note) as to the payment of interest on credits in case of an additional assessment 'made under' certain acts."

I agree with the conclusions reached by the learned court in the case of Riverside & Dan River Cotton Mills, Inc. v. United States, supra, and accept as adequate the reasons stated in the opinion. It follows, therefore, that the defendant, in computing the interest, proceeded upon a proper construction of the Act which imposed its obligations to pay interest and that the amount allowed as interest on the over-payment was substantially correct. There seems to be a slight error in computation of the interest on the second payment constituting the over-payment for 1917. The date of the payment was August 8, 1919, instead of August 18, 1919. This would entitle the petitioner to ten days' additional interest computed upon $4,710.64 credited against the 1919 taxes and upon $22,013.06, the balance of the refunded over-payment of 1917 taxes made August 8, 1919. Ten days' interest on these two amounts would aggregate $44.07, for which amount the petitioner is entitled to recover.

In United States District Court

Petitioner's petition for appeal

Filed and Allowed December 7, 1931

Now comes the petitioner, Bertelsen & Petersen Engineering Co., and being aggrieved by the findings, rulings and opinion of the court and by the judgment entered in pursuance thereof in the

above-entitled cause on the fourth day of December, A. D. 1931, hereby appeals from said findings, rulings and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of errors filed herewith, and its prays that this appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit under the rules of such court in such cases made and provided.

64 And your petitioner further prays that a proper order relating to the security to be required of it be made.

By its Attorneys.

JOSEPH WIGGIN,
LISPENARD B. PHISTER,
JOHN W. LOWRANCE.

December 7, 1931. Appeal allowed.

ELISHA H. BREWSTER,
United States District Judge.

In United States District Court

Assignment of errors

Filed December 7, 1931

The petitioner in this action in connection with its petition for appeal makes the following assignment of errors which it avers occurred upon trial of the cause, to wit:

I. That the United States District Court for the District of Massachusetts erred in ruling that the petitioner was entitled to recover only $44.07.

II. That the United States District Court for the District of Massachusetts erred in refusing to make the following rulings of law:

1. That the waiver of February 23, 1924 (Petitioner's Exhibit 5), upon its signature and acceptance by D. M. Blair, Commissioner, supplanted and rendered null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4).

2. That the waiver of February 27, 1924 (Petitioner's Exhibit 6), upon its signature and acceptance by D. H. Blair, Commissioner, supplanted and rendered null and void the waiver of February 23, 1924 (Petitioner's Exhibit 5).

3. That the close proximity of the dates of January 8, 1924, February 23, 1924 and February 27, 1924, upon which the three waivers (Petitioner's Exhibits 4, 5 and 6, respectively) were executed, in and of itself, taken in conjunction with the subject matter thereof, negatives the claim of the respondent that the waivers are to be tacked on to each other, as is contended by the respondent.

65 4. That the close proximity of the dates January 8, 1924, February 23, 1924, and February 27, 1924, upon which the three waivers (Petitioner's Exhibits 4, 5, and 6, respectively) were executed, in and of itself affirmatively shows that the petitioner intended that the waiver of February 23, 1924 (Petitioner's Exhibit 5), should supplant the waiver of January 8, 1924, (Petitioner's Exhibit 4), and that the waiver of February 27, 1924 (Petitioner's Exhibit 6), should supplant the waiver of February 23, 1924 (Petitioner's Exhibit 5).

5. That in signing and accepting the waiver of February 23, 1924 (Petitioner's Exhibit 5), and the waiver of February 27, 1924 (Petitioner's Exhibit 6), the Commissioner, D. H. Blair, acceded to and acquiesced in the acts of the petitioner in supplanting the waiver of January 8, 1924, with the waiver of February 23, 1924, and in supplanting the waiver of February 23, 1924, with the waiver of February 27, 1924, and the act and intention of the petitioner in respect of said transactions were manifestly known to the Commissioner.

6. That in attempting to assess the deficiency assessment of $34,555.68 the respondent purported to act under the Internal Revenue Act of 1926.

7. That the deficiency assessment of $34,555.68, if lawfully made, was made under the Internal Revenue Act of 1926.

8. That the statutory period of assessment, as extended by waiver and/or by statute, had expired prior to the alleged date of the deficiency assessment of $34,555.68 for the year 1918.

9. That the statutory period for deficiency assessment having expired, the respondent is forced, in its justification of the deficiency assessment of $34,555.68, to depend upon extension thereof by waiver, and it is necessary for the respondent to elect as to whether it shall stand upon the waiver of January 8, 1924 (Petitioner's Exhibit 4), the waivor of February 23, 1924 (Petitioner's Exhibit 5), or the waiver of February 27, 192. (Petitioner's Exhibit 6), as the waiver so chosen by election may be extended by the waiver of October 30, 1924 (Petitioner's Exhibit 7).

66 10. That the writing by the respondent in longhand of the figures and word "1918 Expires 6/15/26" appearing on Petitioner's Exhibit 8, which bears date September 16, 1925, constitutes an admission by the respondent that it had accepted the waiver of February 23, 1924 (Petitioner's Exhibit 5), as displacing and rendering null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4).

11. That the respondent's letter to the petitioner dated October 25, 1924 (Petitioner's Exhibit 13) in and of itself shows that the respondent had, on or before the date of said letter, elected to stand upon the waiver of February 23, 1924 (Petitioner's Exhibit 5), and had treated as null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4), and had, for its own purposes, disregarded,

as expiring aforetime, the waiver of February 27, 1924 (Petitioner's Exhibit 6).

12. That the respondent's letter to the petitioner dated October 25, 1924 (Petitioner's Exhibit 13), within itself constitutes an admission that the respondent had, on or before the date of said letter, elected to stand upon the waiver of February 23, 1924 (Petitioner's Exhibit 5), and had treated as null and void the waiver of January 8, 1924 (Petitioner's Exhibit 4), and had, for its own purposes, disregarded, as expiring aforetime, the waiver of February 27, 1924 (Petitioner's Exhibit 6).

13. That the words "any waivers already on file with the Bureau," as they occur in the waiver of February 23, 1924 (Petitioner's Exhibit 5), and the waiver of October 30, 1924 (Petitioner's Exhibit 7), can only refer to waivers on file which were in force and effect at the time of filing of said waivers of February 23, 1924 and October 30, 1924, the mere physical presence of the antecedent waivers in the files of the respondent being, as a matter of law, insufficient.

14. That the time for the lawful making of the deficiency assessment for the year 1918 cannot, by any interpretation of the law and the facts, be extended beyond June 27, 1926.

15. That if the respondent, relying on the provisions of the Act of 1926, seeks to obtain, by reason of the suspension of the operation of waivers then in force, time additional unto said waivers,
67 and this court sustains said contention of the respondent, then the period thereby gained will expire June 27, 1926.

16. That judgment should be entered in favor of the petitioner in the sum of $57,544.24, together with interest thereon from October 11, 1927, to the date of the bringing of this suit, together with interest on said sums from the date of the bringing of this suit to the date of judgment.

17. That even though this court should rule that the deficiency assessment of $34,555.68 for the year 1918 was lawful, still there is due to the petitioner on account of interest from it unlawfully withheld, the sum of $19,417.61, together with interest thereon from October 11, 1927, to the date of the bringing of this suit, together with interest on said sums from said date of bringing of this suit to the date of judgment.

18. That even though this court should rule that the deficiency assessment of $34,555.68 for the year 1918 was lawful, still there is due to the petitioner, on account of interest from it unlawfully withheld, the sum of $15,634.52 together with interest thereon from July 27, 1926, to the date of the bringing of this suit, together with interest on said sums from said date of bringing of this suit to the date of judgment.

19. That no notice was given to the petitioner of the deficiency assessment of $34,555.68 within a reasonable time, and said deficiency assessment is, by reason of the respondent's failure to give notice within a reasonable time, void.

III. That the United States District Court for the District of Massachusetts erred in excluding the testimony of Paul J. Bertelsen and of James V. Giblin and in refusing to accept the parole evidence to the effect that waiver No. 2 was sent in order that the year 1917 might be included, waiver No. 1 having been confined solely to taxes for the year 1918; that waiver No. 2 was not in the usual form and that waiver No. 3 was sent to correct the use of the informal waiver No. 2 and specifically embraced the two years 1917 and 1918; and that the sole intent on the part of the petitioner in sending
68 waiver No. 3 was to displace waiver No. 2 and that waiver No. 4 was given on the assumption of the petitioner that waiver No. 2 had been displaced.

IV. That the United States District Court for the District of Massachusetts erred in making the following findings and rulings:

1. That the Commissioner of Internal Revenue in this case complied with all the requirements of law respecting notice of additional assessments.

2. That the waivers of January 8, 1924, of February 23, 1924, and of February 27, 1924, were all in full force and effect when the waiver of October 30, 1924, was given.

3. That the petitioner, by its agreements, extended the period of limitation to January 8, 1927.

4. That the assessment of $34,555.68 was valid and the credit to that extent to the overpayment was a proper credit.

5. That the application and interpretation of Section 1116 (a) of the Revenue Act of 1926 was properly construed by the Court of Claims in Riverside & Dan River Cotton Mills, Inc. v. United States, 37 F. (2d) 965; Graniteville Manufacturing Co. v. United States, 39 F. (2d) 746; National Equipment Co. v. United States, 39 F. (2d) 757; and that the doctrine of these cases was adopted and followed by the court in the instant case.

Wherefore, the appellant prays that said judgment be reversed and that the said District Court for the District of Massachusetts be ordered to enter a decree reversing the decision of said District Court in said cause.

By its Attorneys,

JOSEPH WIGGIN,
LISPENARD B. PHISTER,
JOHN W. LOWRANCE.

Recital as to bond

The sum of two hundred and fifty dollars ($250) was deposited by the petitioner in lieu of bond on appeal on December 7, 1931.

69 [Citation in usual form showing service on Frederick H. Tarr, omitted in printing.]

70 [Clerks' certificates to foregoing transcript, omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1933

IMMEDIATE

This schedule must be executed and all required steps taken without delay.

COMMISSIONER OF INTERNAL REVENUE.

SCHEDULE OF OVERASSESSMENTS

AND

ALLOWANCE OF ABATEMENTS, CREDITS, REFUNDS, AND RELATED CLAIMS, IF ANY

INCOME TAX UNIT

ORIGINAL

Voucher to General Accounting Office

Schedule No. IT-A

Sheet 1 of ..... sheets

RECEIVED—BOSTON, MASS.
JUL 30 1926
CLAIM DIV.—INT. REVENUE

District of MASSACHUSETTS

AUTHORIZATION OF COMMISSIONER

To the Collector ..... District of MASSACHUSETTS

The amounts listed in column 4 as overassessments (or reductions of tax liability) are hereby approved, and the related claims, if any, allowed in the respective amounts indicated by the "Certificates of Overassessment" or "Notices of Adjustment of Claim for Abatement" attached thereto.

You will immediately check each item against the accounts of the several taxpayers, and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated, in whole or in part, and make such abatements as may be warranted by the conditions of the taxpayers' accounts for the years involved.

If any part of any such item is found to be an overpayment, you will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against the taxes due, if any, pending the appropriate entries in your accounts. (This applies only to income, war profits, and excess profits taxes.) Such credits will be entered in column 9, and placed in column 5 of a subsidiary Schedule of Refunds and Credits (Form 7885 A).

The balance, if any, of the overpayment will be entered in column 12, and placed in column 4 of the subsidiary schedule (Form 7885-A) referred to above, and an appropriate memorandum made upon the taxpayer's account.

You will thereupon complete and certify this schedule and the schedule upon Form 7885-A, and return the summary copies of each to the Commissioner of Internal Revenue.

Date ..... 27 .. 5

Deputy Commissioner.

Commissioner of Internal Revenue.

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The entries on this overassessment schedule, together with their totals, have been carefully examined and the law in the case of the respective taxpayers has been determined in accordance with the decisions stated and the law. The overassessments listed in the column headed "Overassessment or Reduction of Tax Liability" appearing in column 4 are recommended for allowance.

Date ..... 27 .. 5

Deputy Commissioner.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items in this schedule have been checked against the accounts of the respective taxpayers concerned and the amounts indicated have been applied as abatements and credits on their accounts.

The amounts of overpayment and the net amounts refundable have been determined to be as indicated hereon.

Date SEP 2 4 1926

Collector ..... District of MASS

ACCOUNTS UNIT

Stated and entered

INITIALS	DATE

(Entries to be made by the Collector)

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name of Taxpayer (3)	Overassessment or Reduction of Tax Liability (Amount) (4)	Ledger, Page and Line, or Account Number (5)	Taxable Year (6)	Abatement (Amount) (7)	Overpayment (Amount) (8)	Credit (Amount carried to Form 7885-A) (9)	Account Credited; Ledger, Page, and Line (10)	Due Date of Items Against Which Credit Was Made (11)	Net Amount Refundable Carried to Form 7885-A (12)	Remarks (13)
2	452133	BERTELSEN & PETERSEN ENGINEERING CO.	91570.34		17		91570.34	4718.66 34556.68	[illegible]	3-15-25 3-15-19	52284.02	

91,320.94

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form approved by the Comptroller General
May 17, 1926

IMMEDIATE

This schedule must be executed and all required steps taken without delay.

COMMISSIONER OF INTERNAL REVENUE.

8-H 1-7-28

SCHEDULE OF REFUNDS AND CREDITS

ILLEGAL OR ERRONEOUS COLLECTIONS

INCOME TAX UNIT

ORIGINAL

Voucher to General Accounting Office

H-13744

Schedule No. [illegible]-2448

Sheet 1 of ..... sheets.

..... Dist. of [illegible]setts

D. C. Voucher No. 5667

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items herein are allowed as they appear for refund or credit on an original schedule (bearing the same number) of overassessments and related claims, if any, heretofore approved and allowed by the Commissioner of Internal Revenue. An examination of the accounts of the several taxpayers named discloses such items to be the portions of such previously allowed overassessments or reductions of tax liability subject to refund or credit.

Date SEP 2 4 1926

Collector ..... District of MASS

CERTIFICATE OF DEPUTY COMMISSIONER

Commissioner of Internal Revenue:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due.

Date .....

Assistant to the Commissioner.

AUTHORIZATION OF COMMISSIONER

To the Disbursing Clerk, Treasury Department:

The items listed in column 4 hereof have been found to be the refundable portions of overassessments heretofore allowed, and the accrued interest, if any, listed in column 6 has been found due. Payment may, therefore, be made in the amounts shown in column 7.

Date .....

Commissioner of Internal Revenue.

UNIT	NOTATIONS	DATE
		NOV 6 192

(Entries to be made by the Collector)

Item No. (1)	Certificate of Overassessment or Claim Number (2)	Name and Address of Taxpayer (3)	Net Amount Refundable (4)	Amount Credited (5)	Interest Accrued (Not to be used by Collector) (6)	Total Refundable (Not to be used by Collector) (7)	Date of Final Payment of Assessments from which Credited and Overpayments Found (8)	Refunding Taxes Illegally Collected: 1926 and Prior Years (9)	19.... (10)	19.... (11)	Paid by Disbursing Clerk, Treas. Dept., or Checks Drawn, Numbered as Follows (12)	Remarks (13)
1	452133	Bertelsen & Petersen Engineering Co.	32304 02	32200 32	2311275		10-14-20	7541977				Re-assessment
2		Bertelsen & Petersen Engineering Co. (Int)	3-10 08		3879 88		10-14-20	1169903				Re-assessment

CERTIFIED FOR PAYMENT

In the Sum of $ 93017.27

SCHEDULE OF OVERASSESSMENTS

TREASURY DEPARTMENT
U. S. Internal Revenue Service
Form 1000
Form approved by Comptroller General U. S.
September 15, 1939

CERTIFIED FOR PAYMENT
in the Sum of $ 9,301.29

SCHEDULE OF OVERASSESSMENTS

ABATEMENTS, CREDITS, AND REFUNDS

INCOME TAX UNIT

J. R. McCarl
Comptroller General
of the United States.
By ... D. C. Bell

Schedule No. IT- 27060

Sheet 1 of ____ sheets

March District of ____

Disbursing Clerk Voucher No. 2068

AUTHORIZATION OF COMMISSIONER

This schedule must be collected and all required steps taken IMMEDIATELY.
The amounts listed in column 5 as overassessments (or reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.
The COLLECTOR will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part and make such abatements as may be warranted by the condition of the taxpayer's accounts for the years involved. If any part of any such item is found to be an overpayment, the Collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the Collector in column 6. The balance, if any, of the overpayment schedules will be entered in column 7 and an appropriate MEMORANDUM made upon the taxpayer's account showing the refund and the amount refunded. The Collector will thereupon complete and certify this schedule and return the same, with the necessary papers, to the Commissioner of Internal Revenue.
The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.
The DISBURSING CLERK, Treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both.

Date ____

C. B. Allen
Deputy Commissioner.

Date ____

C. O. Nash
Acting Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items on this schedule have been checked against the accounts of the respective taxpayers concerned. Abatements and credits in their accounts have been applied in the amounts indicated, and not amounts refundable have been determined as shown in column 7.

Date ____

SEE COLUMNS 2 AND 5

Collector ____ District of ____

INITIALS	DATE

Certificate of Overassessment Number	Name of Taxpayer	Overassessment or Reduction of Tax Liability (Abated)	Tax Year	(Entries to be made by the Collector) Amount Abated	Amount Credited to Other Taxes Due	Net Amount Refunded	(Entries to be made by the Bureau of Internal Revenue) REFUNDING TAXES ILLEGALLY COLLECTED Interest Refund and Credit	Amount Now Paid 1940 For Prior Years	Amount to be Paid 19__	Paid by Direction of Comptroller General Dated / Refunded as Overpaid	Date of Payment
1	2	3	4	5	6	7	8	9	10	11	12
542133	[illegible]										
	[illegible] Engineering Co.	21440		[illegible]		2304 02	[illegible]	[illegible]			
	[illegible]										
	[illegible] Engineering Co.	21440		[illegible]		[illegible]	[illegible]	[illegible]		143094	

VOL. II

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 416

THE UNITED STATES OF AMERICA, PETITIONER

vs.

BERTELSEN & PETERSEN ENGINEERING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 18, 1938
CERTIORARI GRANTED NOVEMBER 21, 1938

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1936.

No. 3243.

UNITED STATES OF AMERICA,

Defendant, Appellant,

v.

BERTELSEN & PETERSEN ENGINEERING CO.,

Plaintiff, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS, FROM JUDGMENT (SWEENEY, J.) NOVEMBER 30, 1936.

TRANSCRIPT OF RECORD.

JAMES W. MORRIS,
Assistant Attorney General,
SEWALL KEY,
Special Assistant to the Attorney General,
FRANCIS J. W. FORD,
United States Attorney,
ARTHUR L. MURRAY,
Special Assistant to United States Attorney,
for Appellant.

RAY HENRY,
for Appellee.

TABLE OF CONTENTS

	Page
Court (Circuit Court of Appeals) and title of case	1
Transcript of Record of District Court:	
Title of Case in District Court, Massachusetts	1
Memorandum as to former appeal	1
Mandate of Circuit Court of Appeals	2
Opinion of Circuit Court of Appeals	4
Motion to amend answer (allowed)	10
Exhibit F—Income and profits tax waiver	11
Hearing	13
Defendant's motion for judgment	13
Stipulation as to interest	14
Judgment	15
Petition for appeal filed and allowed	15
Opinion of District Court	16
Bill of exceptions	23
Testimony of Paul J. Bertelsen	25
Defendant's Exhibit C—Claim for refund	37
Assignment of errors	62
Citation issued	63
Certificate of Clerk of District Court	63
Enlargement of time for docketing case	64
Proceedings in U. S. C. C. A., First Circuit	65
Minute entry of hearing	65
Opinion, Wilson, J.	65
Judgment	68
Petition for rehearing	68
Order granting petition for rehearing	74
Minute entry of rehearing	74
Opinion, Wilson, J., on rehearing	75
Judgment on rehearing	78
Recital as to issuance of mandate	78
Clerk's certificate	78
Order allowing certiorari	81

116072—38

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

OCTOBER TERM, 1936.

No. 3243.

UNITED STATES OF AMERICA,
DEFENDANT, APPELLANT,

v.

BERTELSEN & PETERSEN ENGINEERING CO.,
PLAINTIFF, APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT

No. 4146, LAW DOCKET.

BERTELSEN & PETERSEN ENGINEERING CO.,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT.

[MEMORANDUM. This cause has been heretofore appealed by Bertelsen & Petersen Engineering Co., plaintiff, to the U. S. Circuit Court of Appeals for the First Circuit from the judgment for the plaintiff, entered December 4, 1931. An appeal record was duly certified by the clerk of the United States District Court and entered in said U. S. Circuit Court of Appeal for the First Circuit at the October Term, 1931, and entitled Bertelsen & Petersen Engineering Co., Plaintiff, Appellant, v. United States of America, Defendant, Appellee, and numbered 2668, to which record reference is hereby made in lieu of an actual incorporation herein. JAMES S. ALLEN, CLERK.]

The Mandate of the United States Circuit Court of Appeals for the First Circuit was received and filed in the clerk's office on the twenty-sixth day of October, A. D. 1932, and the same being understood by the court it was ordered that the same be entered of record and was duly entered at the September Term of this court, A. D. 1932, and is in the words and figures following:

MANDATE.

[Filed October 26, 1932.]

United States of America, ss:

The President of the United States of America,

(L. S.)

To the Honorable the Judges of the District Court of the United States for the District of Massachusetts, Greeting;

Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, or some of you, in a cause numbered and entitled,

No. 4146, Law Docket,

BERTELSEN & PETERSEN ENGINEERING CO.,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant,

on December 4, 1931, it was considered by the court, the Honorable Elisha H. Brewster, District Judge, sitting, that the said Bertelsen & Petersen Engineering Co., petitioner, recover from the United States of America, defendant, the sum of forty-four and seven one-hundredths dollars ($44.07), without costs.

And whereas said Bertelsen & Petersen Engineering Company, Plaintiff, appealed from said judgment to this United States Circuit Court of Appeals for the First Circuit, as by inspection of the transcript of the record in said cause of the said District Court, which was brought into the United States Circuit Court of Appeals for the First Circuit, by virtue of the aforesaid appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and thirty-one, the said cause came to be heard before the said Circuit Court of Appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now, to wit, August 2, 1932, here ordered, adjudged and decreed as follows: The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

A certified copy of the Opinion of this Court accompanies this mandate.

You, therefore, are hereby commanded that such further proceedings be had in said cause in conformity with the Judgment and Opinion of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable Charles Evans Hughes, Chief Justice of the United States, the twenty-fifth day of October, in the year of our Lord one thousand nine hundred and thirty-two.

ARTHUR I. CHARRON,

Clerk of the United States Circuit Court of Appeals for the First Circuit.

CERTIFIED COPY OF OPINION OF THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

August 2, 1932.

[Accompanying Mandate]

Before Bingham, Wilson and Morton, JJ.

Morton, J. This is an action to recover $34,555.68 with interest, constituting part of an admitted over-payment by the plaintiff on its income taxes for 1917. The plaintiff's total over-payment for that year amounted to $91,570.34. For the next year, 1918, the government assessed on the plaintiff an additional tax in the amount now sued for, and collected it by applying a credit from the over-payment of the preceding year. The plaintiff objected to this, on the ground that the additional assessment was barred by the statute of limitations. It was admittedly made after the expiration of the statutory period; but the government contended that the time had been so extended by waivers given by the plaintiff as to include the date, July 1926, on which the additional assessment was made. The plaintiff denied that the waivers given had that effect. The District Judge resolved this question of fact and law against the plaintiff. An incidental, though not unimportant, question of interest was also involved which the District Judge decided in favor of the government.

The plaintiff's return of its 1918 income tax was filed on 16 June 1919. The five-year period within which additional assessments for that year could be made expired on 16 June 1924. The taxpayer signed four waivers purporting to extend this period. The first waiver was dated 8 January 1924; it said, "This waiver is in effect for one year from the date it is signed by the tax-payer," *i. e.* it extended the time to 8 January 1925. It covered only the 1918 tax. The second waiver was dated 23 February 1924; it extended the time for "one year after the expiration of the statutory period of

limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau." It covered not only the year 1918, but also the year 1917. By tacking it to the preceding waiver, it carried the time within which an additional assessment for 1918 could be made up to 8 January 1926. The third waiver was dated 27 February 1924; it was "for the years 1918 (1917 extended)." It covered the period "for one year from the date it is signed by the taxpayer," *i. e.* to 27 February 1925. On the face of the papers it effected nothing; it is obviously inconsistent with the preceding waiver. The fourth and last waiver was dated 30 October 1924. It covered only the year 1918, and extended the time "one year after the expiration of the statutory period of limitation, . . . or the statutory period of limitation as extended by section 277 (b) of the Revenue Act of 1924, or by any waivers already on file with the Bureau."

By tacking the last waiver to the second waiver, and tacking the second to the first, the time was extended to January 1927. It will be observed that the first three waivers were given within a period of less than two months in January and February 1924,—two of them within the space of four days,—and that these two were inconsistent, the later being of no effect if the earlier be taken according to its terms.

In this situation the plaintiff offered to show by extrinsic evidence that the second waiver was sent in order that the year 1917, which was not mentioned in the first waiver, might also be covered; that this second waiver was not on the usual form, and the third waiver was made out on the standard form, and was intended to correct the informality in the second and to be in substitution for it; that the last waiver was given on the assumption that the second had been so displaced. This evidence was excluded by the District Judge, and the petitioner excepted.

We are of opinion that the evidence should have been received. The basic purpose of judicial proceedings is to dis-

cover the true facts and having done so to give judgment as is right upon them. Arbitrary rules of law should not be pressed beyond what necessity requires. The parole evidence rule, as applied to contracts, rests on estoppel, *i. e.* that a party having put his agreement with the other party into writing will not be heard to vary or contradict the written instrument. *Central Coal & Coke Co.* v. *Good*, 120 Fed. 793, 798, cited with approval in *Miller* v. *Robertson*, 266 U. S. 243 at 255. A waiver,—which has been defined as "the intentional relinquishment of a known right" (218 Mass. 29),—is not a contract (*Stange* v. *United States*, 282 U. S. 270), and it is doubtful how far the parole evidence rule applies to such writings. *Olmstead* v. *Mansir*, 10 Allen 424. Even as to contracts the rule has never been so rigidly applied as to prevent showing the real nature of the transaction (*Brick* v. *Brick*, 98 U. S. 514; *Mobile & Montgomery Ry.* v. *Jurey*, 111 U. S. 584, 591); nor, as between inconsistent instruments, which one the parties intended should be effective. In *Payson* v. *Lamson*, 134 Mass. 593, a mortgage was conditioned on the payment of certain notes with 6 percent interest; the *notes* were drawn without interest. It was held that the plaintiff might show that, by the understanding of the parties, the notes were to carry interest as stated in the mortgage.

In the opinion the court said: "Where two papers are executed at the same time, relating to the same contract or transaction, both may be looked at for the purpose of showing what the actual contract or transaction was. If, on examination, it appears that they are in some respects inconsistent, as, for example, if a contract is executed in duplicate and the two parts which ought to be alike are found to be different, or if a mortgage does not correspond with the note which it was intended to secure, it is apparent that the inconsistency must have occurred through some mistake or accident. It certainly is not to be supposed that the parties have understandingly intended to execute and deliver, as parts of the

same transaction, papers which are inconsistent with themselves; and if it appears that they have done so, it is natural and reasonable to infer that one of the papers was so executed and delivered by mistake. In such case, it not being apparent on the face of the papers which one expresses the real intention and agreement of the parties, there is no good reason why extrinsic evidence should not be received in a court of law to show the fact. Each paper may be put in evidence, as an admission or declaration of whatever is therein contained. An argument may also be drawn from the circumstances of any particular case, that one of the papers would be more likely to express the true meaning of the parties than the other. But there is no legal presumption to that effect. There being, then, two inconsistent writings, both admissible as evidence of the transaction to which both relate, and there being no legal presumption in favor of either, but it being a question of fact which correctly represents the agreement of the parties, we should be slow to admit that a court of law, encountering such a state of facts, would be powerless to deal with it, and unable to consider other evidence to show which paper was delivered understandingly, and which through mistake. On the contrary, we are of opinion that, on the trial of the action at law, it would be entirely competent for the present defendants, on the one hand, to show by extrinsic evidence that the notes expressed the real understanding and agreement of the parties; or for the present plaintiffs, on the other hand, to show in like manner that the mortgage expressed such understanding and agreement."

These observations of a very able judge apply with force to the case before us. Part of the period of extension as claimed by the defendant is covered by four separate waivers, all of the same general character, each given by the plaintiff and accepted by the government. There was no apparent reason for such duplication. As has been said, the waiver of February 27 covers no period, if the government's contention

be accepted, which was not already covered by that of February 23. On the face of the papers a probability of mutual mistake appears which, even if they be regarded as contracts, opened the door to extrinsic evidence to prove the real understanding of the parties, as to which of the overlapping inconsistent instruments was relied on. Moreover, it is always open to show by parole evidence that a written agreement, not involving matters required to be in writing, was subsequently abandoned or rescinded by parole. *Bradford* v. *Union Bank*, 13 How. 57 at 66. *Thomas* v. *Barnes*, 156 Mass. 581.

As to interest: What has been decided is sufficient to dispose of this appeal. But as questions of interest are likely to arise, in one form or another, on the new trail, they ought to be determined. Interest against the government is only allowable as provided by statute. *Angarica* v. *Bayard*, 127 U. S. 251, 260; *Boston Sand & Gravel Co.* v. *United States*, 278 U. S. 41. There is no fixed right to it. It depends on the law at the time when the claim is allowed by the department or, if the claim is litigated, when the case is heard by the court. *Hind* v. *United States*, 41 Fed. 2d, 892 (Ct. of Claims).

The plaintiff contends that if the additional assessment of $34,555.68 was valid it should be regarded as having been made under the Act of 1926, and the credit should, therefore, carry interest to the date of the assessment (July, 1926), instead of to the due date of the tax against which it was taken. (Revenue Act of 1926 sec. 1116.) For the reasons stated in *Riverside Cotton Mills* v. *United States*, 37 Fed. 2d, 965 (Ct. of Claims), with which we agree, the District Judge correctly ruled that the assessment was made under the Act of 1918, and that the government's computation of interest was in this respect right.

The plaintiff further contends that it was entitled to interest on the amount actually refunded, not merely to the date of the allowance of the refund (July 1926), but to the

date of payment of it (October 1927). This payment was made without suit. The Act of 1926, section 1116, in force when the refund was made, contained explicit provisions as to interest on such refunds. It is controlling. The plaintiff's claim in this respect was properly disallowed.

It follows that, if the additional assessment of $34,555.68 was legally made, the rulings of the trial judge on interest were correct. No question is made as to the slight error in dates which he noticed and corrected.

If the additional assessment was not legally made, then as this sum will be recovered by suit in court, interest on it will be governed, not by the Act of 1926, nor by any provisions as to interest on *credits*, but by the current act governing interest on claims against the government collected through judgment *of a court*, viz., section 319 of the act making appropriations for the legislative branch of the government and for other purposes approved June 30, 1932. We think this act sufficiently broad in its language to include all pending cases.

The judgment of the District Court is vacated, and the case is remanded to that court for further proceedings not inconsistent with this opinion.

[SEAL]
true copy.
Attest:

ARTHUR I. CHARRON,
Clerk.

This cause was thence continued from term to term to the June Term, A. D. 1934, when, to wit, August 6, 1934, the following motion to amend answer was filed by the defendant:

MOTION TO AMEND ANSWER.

[Filed August 6, 1934.]

Now comes the respondent in the above-entitled action and moves to amend its answer to the amended petition as follows:

The respondent, not waiving its motion to amend its answer, filed on January 15, 1931, and allowed on said date, and its answer to the amended petition filed on February 16, 1931, but expressly embodying herein by reference all facts alleged in said motion (including the exhibits attached thereto) and in said answer, further answers the amended petition as follows:

And further answering the respondent says that on December 10, 1925, the petitioner filed a waiver extending the statutory period for the assessment and collection of taxes for the year 1918 until December 31, 1926. A certified copy of said waiver is attached hereto, marked "Exhibit F" and by reference made a part hereof.

FRANCIS J. W. FORD,
United States Attorney.

By J. Duke Smith,
Special Assistant to the
United States Attorney.

UNITED STATES OF AMERICA,

TREASURY DEPARTMENT
WASHINGTON

December 8, 1930.

Pursuant to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Income and Profits Tax Waiver for 1918, dated December 10, 1925, filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, filed in this Department.
[SEAL]

Exhibit F.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:
F. A. BIRGFELD,
Chief Clerk, Treasury Department.

H.C.C. RMS WWB AMR RES CMC B

Form 66—Revised November, 1929—Treasury Department, Chief Clerk and Superintendent. U. S. Government Printing Office: 1929 2—8615

Treasury Department
Internal Revenue Service
Form 672A

4146 Law
Defts Ex A
JEG Jr.
6/3/36

Stamped on face:
Received Dec 21 1925
Special Assessment Section

INCOME AND PROFITS TAX WAIVER

For Taxable Years Ended Prior to January 1, 1922

IT:E:SM
SBD:A—5983 5

December 10th, 1925.

In pursuance of the provisions of existing Internal Revenue Laws Bertelsen and Petersen Engineering Co., a taxpayer of East Boston, Mass., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in the tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

BERTELSEN & PETERSEN ENG. CO.,
Taxpayer.

[Seal]

By Paul J. Bertelsen,
Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

This cause was thence continued to the September Term, A. D. 1934, when, to wit, December 3, 1934, said cause came on for hearing on the aforementioned motion to amend answer, the Honorable Hugh D. McLellan, District Judge, sitting, and it was ordered by the court that said motion to amend answer be allowed.

The cause was thence continued to the December Term, A. D. 1935, when, to wit, January 3, 1936, said cause was set down for trial without a jury, after Mandate, on the pleadings and evidence, and was heard in part by the court, the Honorable George C. Sweeney, District Judge, sitting, findings and rulings to be filed later.

On the said 3rd day of January, A. D. 1936, the following defendant's motion for judgment was filed:

DEFENDANT'S MOTION FOR JUDGMENT.

[Filed January 3, 1936.]

Now comes the respondent in the above-entitled action and on the pleadings and the evidence herein moves that any judgment to be entered for the petitioner be limited to Forty-four Dollars and Seven Cents ($44.07).

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: J. Duke Smith,
Special Assistant to the United States Attorney.

Said cause was thence continued to the March Term, A. D. 1936, when, to wit, April 22, 1936, trial was resumed before the Honorable George C. Sweeney, District Judge, sitting as aforesaid, and it was ordered by the court that the defendant's motion for judgment be denied, exceptions being saved, and that judgment be entered for the plaintiff for thirty-four thousand five hundred fifty-five dollars and sixty-eight cents ($34,555.68), with interest at 6% from August 8, 1919.

On the said 22nd day of April, A. D. 1936, an opinion of the court was announced.

This cause was thence continued from term to term to the June Term, A. D. 1936, when to wit, June 24, 1936, a defendant's bill of exceptions was filed within extended time and assented to.

Said cause was thence continued to the present September Term, A. D. 1936, when, to wit, October 20, 1936, the defendant's bill of exceptions is allowed by the court.

On the said 20th day of October, A. D. 1936, the following stipulation with respect to interest is filed and approved:

STIPULATION WITH RESPECT TO INTEREST UNDER OPINION OF COURT DATED APRIL 22, 1936.

[Filed and approved October 20, 1936.]

It is hereby stipulated by the parties in the above-named action that based upon the opinion of the Court, dated April 22, 1936, in which it was held that judgment is given for the petitioner in the amount of $34,555.68, interest should be computed on $28,045.14 of the amount, from August 8, 1919, and on the balance of $6,510.54, interest should be computed

from October 14, 1920, the total amount of the interest to be computed in accordance with the statutes applicable thereto.

RAY HENRY,
Attorney for the Petitioner.

FRANCIS J. W. FORD,
United States Attorney.

By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Approved
G. C. Sweeney
10-20-36

On the 30th day of November, A. D. 1936, it is considered by the court, the Honorable George C. Sweeney, District Judge, sitting, on the finding of the court, that the said Bertelsen & Petersen Engineering Company, plaintiff, recover of the said United States of America, defendant, the sum of thirty-four thousand five hundred fifty-five dollars and sixty-eight cents ($34,555.68), together with interest on twenty-eight thousand forty-five dollars and fourteen cents ($28,045.14) of the amount from August 8, 1919, and on the balance of six thousand five hundred ten dollars and fifty-four cents ($6,510.54) from October 14, 1920, according to law.

From the foregoing judgment, a petition for appeal to the United States Circuit Court of Appeals for the First Circuit was filed by the defendant on February 18, 1937, and was allowed by the court on the same day.

OPINION.

April 22, 1936.

SWEENEY, J. This is an action at law to recover $34,555.68, with interest, constituting a part of an admitted overpayment by the plaintiff on its income taxes for 1917. For the year 1918, the Government assessed a deficiency tax against the taxpayer, and collected it by deduction from the amount overpaid in the previous year. The question before this Court is whether the deficiency assessment for the year 1918 was barred by the statute of limitations as extended by waivers filed by the taxpayer. At a previous trial of this case the District Court Judge excluded evidence offered by the plaintiff for the purpose of explaining the duplication and inconsistency in certain waivers filed by the plaintiff. On appeal the Circuit Court sustained the plaintiff's contention that the Judge had erred in excluding this parole evidence, and the case was remanded to this Court for further proceedings not inconsistent with its opinion. *Bertelsen & Petersen Engineering Company* v. *United States of America*, 60 Fed. (2nd) 745.

Findings of Fact.

The facts regarding the filing of the waivers are as follows: The five-year period during which additional assessment for the year 1918 might have been made expired June 16, 1924. The taxpayer signed five waivers purporting to extend this period.

When this case was before the Circuit Court of Appeals there were but four waivers involved. After the case was remanded, a motion of the defendant to amend its answer so as to set up a fifth waiver was allowed.

Chronologically, the waivers were as follows: The first waiver was dated January 8, 1924, and covered only the 1918

tax. It extended the time to January 8, 1925. The second waiver was dated February 23, 1924, and covered the years 1917 and 1918, and was intended to be substituted for, and not to extend the waiver signed on January 8, 1924. The reason for filing this waiver was to include in the same waiver the returns for the years 1917 and 1918, because the plaintiff wished the period of both returns to expire on the same date inasmuch as both it and the Government had treated the 1917 and 1918 returns together. So far as the waiver filed on January 8, 1924 and the waiver filed on February 23, 1924 were concerned, I find that it was intended by both parties that the period of limitation would be extended to February 28, 1925. A third waiver was dated February 27, 1924 which covered both the 1917 and 1918 returns, and was intended to extend the period of limitation one year from the date of its signature. This waiver was filed by the plaintiff because it had noted the possibility of a misunderstanding of the two waivers filed on January 8th and February 23, 1924, and to eliminate any suggestion that it intended to extend the limitation period of the 1918 return for two years. It was for the purpose of clarifying the two that had been previously filed, and supports the contention of the plaintiff that it never intended that there would be a "tacking" of the various waivers for in the third waiver it specified that the date was extended "for one year from the date it is signed by the taxpayer."

Before passing to the fourth waiver, it is to be noted that the plaintiff received a letter from the government under date of October 25, 1924 requesting that a fourth waiver be signed "in view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918." This is consistent with the plaintiff's contention that the third waiver was intended to be substituted for the previous two waivers, and it is apparent from the Government's letter of October 25, 1924 that it so understood. I find that

the third waiver serves to extend the limitation period to February 27, 1925 only.

A fourth waiver was filed on October 30, 1924, covering only the year 1918, and extended the time "one year after the expiration of the statutory period of limitations • • • as extended • • • by any waivers already on file with the Bureau." It is perfectly obvious that on October 25, 1924 the Government treated the three waivers then filed as expiring at an early date, and called the attention of the taxpayer to the fact that the waivers were about to expire. If the theory of "tacking" urged at this time was in existence then, the Government would not have had an occasion to call for the new and fourth waiver, and there would not have been "an early expiration date."

On the receipt of the Government's letter of October 25, 1924, the plaintiff checked the dates on the previous waivers, and, believing that the limitation period as extended by it was to expire on February 27, 1925, executed the fourth waiver intending to extend the period "one year after the expiration of the statutory period of limitations • • • as extended • • • by any waivers already on file" which would bring it in the light of the foregoing to February 27, 1926.

There was no evidence offered by the Government to controvert the contention of the plaintiff, and, as a matter of fact, the plaintiff's witnesses were not cross-examined with relation to the four waivers referred to above. Government counsel addressed themselves entirely to the fifth waiver upon which great reliance is placed. I find, so far as the four waivers are concerned, that the statutory period of limitations was extended only to February 27, 1926, and that, unless the fifth waiver hereinafter discussed constituted a valid extension of the period of limitations to a date beyond the date of the assessment which was July 27, 1926, the plaintiff is entitled to recover.

On July 27, 1926, a deficiency assessment of $34,555.68

was made against this plaintiff; notice of this assessment was not actually communicated to the plaintiff until October 11, 1927.

The facts surrounding the fifth waiver are as follows: On December 5, 1925, the Government wrote to the plaintiff suggesting that "the statutory period as extended *by the waiver* (underlining ours) now on file" was about to expire, and asked for the execution of another waiver extending the statutory limitation to December 31, 1926. It is obvious that at this time the Government was not considering the theory of "tacking" the four waivers previously filed with it, since it referred to but one waiver, and it pointed out that the waiver would expire presently. This supports the finding of this Court as to the intent of the parties respecting the four waivers.

There was no evidence that the plaintiff ever replied to the Government's letter of December 5, 1925 requesting the signature of the fifth waiver. However, the waiver was executed by the plaintiff on December 10, 1925, and was received in the Special Assessment Section of the Treasury Department on December 21, 1925. The eleven-day delay between the date of execution and the date of its receipt by the Government is explained by the following facts: On the receipt of the Government's letter of December 5, 1925, asking for the fifth waiver, the plaintiff executed the waiver, but instead of returning it to the Government, forwarded it to the plaintiff's tax consultant in New York with instructions to determine the desirability of filing the waiver, and with directions not to file the waiver without specific author[illegible] from the plaintiff. The New York tax consultant received the waiver with the instructions from the plaintiff as set forth above, and he, in turn, forwarded the waiver to his Washington tax associate with the same instructions. In disregard of these instructions from his New York associate, the Washington tax consultant of the plaintiff filed the waiver, and did so

without authority from the plaintiff who had never reached a decision to file the fifth waiver. The plaintiff contends that the actual filing does not constitute a valid waiver of the limitation period since it was filed without the plaintiff's authority and consent. It further contends that the fifth waiver is invalid, first, because it was not signed by the Commissioner, and secondly, that if signed by the Commissioner such signature was not effective to validate the waiver because it was signed after the expiration of the limitation period as extended by the fourth waiver.

Conclusions

Considering first whether there has been a sufficient compliance with section 278 (c) of the Revenue Act of 1924, which provides as follows: "Where both the Commissioner, and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be assessed at any time prior to the expiration of the period agreed upon". In the case of *Stearns Co.* v. *United States*, 291 U. S. 54, it was held that the waiver itself need not be signed by the Commissioner, but that a notation on an assessment list attached to the certificate of additional assessments signed by the Commissioner was effective compliance with the statute. In the Stearns case, there appeared on the assessment list attached to the certificate and opposite the item effecting the petitioner the words and figures as follows:

"7 31 17 Fisc. 1753361. O. L. 4/17/23; waiver."

There were but two waivers filed in the Stearns case; the first of which had been signed by the Commissioner, and by reference to the symbols above noted, it could be ascertained that the notation referred to the second or unsigned waiver. Having been able to trace the connection between the entry on

the assessment list, and the waiver to which it referred, the court held that this was satisfactory compliance with the statute which called for the consent of the Commissioner in writing.

In the instant case, on July 27, 1926 an assessment certificate was signed by the Commissioner which was attached to the assessment list, and following the item referring to the petitioner there appeared on the assessment list the following:

"Remarks 1918 403152 R.A.R. waiver O. L. 1/23/26."

Under the theory laid down in the Stearns case, if these notations can be construed as referring to the fifth waiver, then the Commissioner has complied with the statute if the notation were made at the proper time. For the purpose of connecting this entry, the Government produced as a witness the chief of the Additional Assessments and Records Subsection of the Internal Revenue Bureau, who had charge of preparing the Commissioner's additional assessment list on which the entry here involved appeared. The most that can be gathered from his testimony was that the list was prepared in the first instance by an Elliot-Fisher operator; that it was then checked to determine whether a valid waiver was on file or the statute of limitations had not been waived; that those whose initials appeared on the list indicated by their signing their initials that they were satisfied that valid waiver was on file. However, I am unable to conclude that any of the examining officials referred to the fifth waiver. Whether the entry of the word "waiver" on the additional assessment list was made in the mistaken belief that the fifth waiver was signed or under the theory now advanced by the plaintiff that the four previous waivers had not expired either by virtue of their own limitation, or under a theory of "tacking" has not been proven. No part of the entry on the assessment list is helpful to ascertain to which waiver the notation on the assessment list referred, and from the evidence before me

I am not satisfied that it refers to the fifth waiver. I, therefore, reach the conclusion that the Commissioner never consented in writing to the extension purported to be given by the fifth waiver, and that the fifth waiver is ineffective to extend the period of limitations. *Commissioner of Internal Revenue* v. *U. S. Refractories Corporation,* 64 Fed. (2nd) 69. Affirmed 290 U. S. 591.

Another objection to the validity of the fifth waiver is that the signature of the Commissioner if it could be deemed a proper compliance with the statute was not made within the life of the fourth waiver. Section 1106 (a) of the Revenue Act of 1926 provided that:

> "The bar of the statute of limitations against the United States in respect to any Internal Revenue tax shall not only operate to bar the remedy but shall extinguish the liability; • • • ".

Since the limitation period as extended by the waivers expired on February 27, 1926, the liability also ceased on that date. The greatest extension of the limitation period under sections 283 (c) of the Revenue Act of 1926 and section 277 (b) of the Revenue Act of 1924 would be to June 26, 1926. Even if the notation on the additional assessment list could be considered a proper compliance with the statute governing the consent of the Commissioner, nevertheless, it must have been exercised before June 26, 1926, or the liability was extinguished.

The subsequent repeal of this section by the Revenue Act of 1928, 45 Statutes 874, did not revive a dead liability or create a new obligation. *Dobbins* v. *Commissioner of Internal Revenue,* 31 Fed. (2nd) 935. Neither could the subsequent signing of the waiver, if it could be deemed such, serve to revive a liability that was clearly extinguished on June 26, 1926.

It seems unnecessary to consider the contention of the plaintiff that the fifth waiver was filed without its consent or authority, as I am of the opinion that the case is disposed of on the other grounds set forth in this opinion.

The respondent's motion for judgment is denied. Judgment is given for the petitioner in the amount of $34,555.68 with interest to be agreed upon between the parties hereto or by a subsequent determination by this Court if they are unable to agree; to be computed under 28 USCA § 284 (b).

DEFENDANT'S BILL OF EXCEPTIONS.

[Filed June 24, 1936; allowed October 20, 1936.]

This is an action at law by Bertelsen & Petersen Engineering Company, a Massachusetts corporation, against the United States, to recover $34,555.68, with interest, representing a portion of an overpayment of said corporation's income taxes for the year 1917 which was retained by the Government to cover an assessment made against said corporation for a deficiency in income taxes for the year 1918. The case was originally tried before Brewster J., on February 16, 1931, who on April 6, 1931, handed down an opinion ordering judgment for the petitioner in the amount of $44.07. Judgment was entered for this amount on December 4, 1931. The petitioner appealed to the Circuit Court of Appeals for the First Circuit which, on April 2, 1932, vacated the judgment of the District Court and remanded the case to that Court "for further proceedings not inconsistent with this opinion," 60 Fed. (2nd) 745. On August 16, 1934, the respondent filed a motion to amend answer to petitioner's petition, which motion included an amendment to said answer, as follows:

> Now comes the respondent in the above-entitled action and moves to amend its answer to the amended petition as follows:

The respondent, not waiving its motion to amend its answer, filed on January 15, 1931, and allowed on said date, and its answer to the amended petition filed on February 16, 1931, but expressly embodying herein by reference all facts alleged in said motion (including the exhibits attached thereto) and in said answer, further answers the amended petition as follows:

And further answering the respondent says that on December 10, 1925, the petitioner filed a waiver extending the statutory period for the assessment and collection of taxes for the year 1918 until December 31, 1926. A certified copy of said waiver is attached hereto, marked "Exhibit F" and by reference made a part hereof.

Said motion to amend answer was allowed on December 3, 1934. The case was again tried before Sweeney J., on January 3, 1936, on the transcript of record of the District Court, in the Circuit Courts of Appeals, which included all pleadings in the case up to the date of the original trial; the pleadings filed subsequent to April 2, 1932, the date of the opinion of the Circuit Court of Appeals for the First Circuit; certain documentary evidence introduced by the respondent during the trial January 3, 1936, marked respondent's exhibits A, B and C; and certain oral evidence. The transcript of record of the District Court, in the Circuit Court of Appeals for the First Circuit, which included all pleadings in the case up to the date of the original trial, which transcript was introduced during the trial of January 3, 1936, and marked petitioner's exhibit 1; the pleadings filed subsequent to April 2, 1932, the date of the opinion of the Circuit Court of Appeals for the First Circuit; and the documentary evidence submitted by the respondent during the course of the trial of January 3, 1936, and marked respondent's exhibits A, B and C are ex-

pressly incorporated herein and made a part hereof by reference, as if the same were set out herein in full, and may be referred to as a part of this bill of exceptions.

Paul J. Bertelsen, called as a witness by and on behalf of the petitioner, after being sworn, testified as follows:

Direct Examination.

I live at Boston, Massachusetts. I am now in the distillery business. I was vice-president of the Bertelsen & Petersen Engineering Company on January 8, 1924, and continued as such for some time there after. I recall that the first waiver applicable to the year 1918 was filed January 8, 1924. On February 23, 1924, we filed the second waiver. On February 27, 1924, the third waiver was filed. On October 30, 1924, the fourth waiver was filed. The waiver of January 8, 1924, referred to the year 1918; the waivers of February 23, 1924, and February 27, 1924, referred to the years 1917 and 1918, while the waiver of October 30, 1924, only referred to the year 1918. The first waiver was filed in the ordinary course of business at the request of the Government for extension of the time of assessment and collection of the 1918 tax. We had previously filed an unrestricted waiver for the year 1917 which, under the ruling of the Bureau as we understood it, was to expire April 1, 1924; consequently, we received a letter requesting a new waiver for the year 1917. In response to that letter we sent the waiver of February 23, 1924. The purpose in sending that waiver was to include only the year 1917. There was no request for any extension of the year 1918 and no necessity for any extension for the year 1917, as that had already been covered by the waiver of January 8, 1924. The year 1918 was included in the waiver of February 23, because the years 1917 and 1918 had always been considered together both by ourselves and the Bureau, and we wished to include the two years in the same documents so they

would both expire at the same time. The request for the waiver of 1917 came after January 8, 1924. The year 1918 was included in the waiver of February 23, because we decided to have both years covered by one waiver. We intended to have the waiver of January 8, 1924, supplanted and did not intend to give a further year's extension.

At this juncture the Government objected to further interrogation relative to intention without showing that such intention was communicated to anyone in the Bureau of Internal Revenue.

By the Court. I understand the matter is back here on the question intent. "Proceed."

The Witness. Immediately following the sending of the second waiver of February 23, 1924, we noticed that the language of the second waiver differed from the language of the first waiver, and after conference with our tax consultant we decided that there might be some misunderstanding, that we might in effect have extended the time unnecessarily for two years for 1918. In order to definitely pin the separation date to a definite date we immediately, four days after the filing of the second waiver, sent the third waiver, which was limited to one year from its date, and which covered both years. In including the year 1918 at no time did we intend to extend the time within which the assessment might be made more than one year. There was no intention that one waiver should be tacked onto the other and give additional time within which the tax might be assessed. The waiver of October 30, 1924, was sent at the Government's request. We received a letter from the Government requesting that waiver and checked the dates, and believing that the waiver of February 27 was controlling and would presently expire, as the Government stated in its letter, we forwarded the fourth waiver, which was for one year or such further time as extended by the statute and the other waivers on file.

Cross Examination.

The witness was directed to examine petitioner's Exhibit 9 of the transcript of the record on appeal (marked Plaintiff's Exhibit I), part of which was read into the record as follows (p. 8):

> "However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver."

Pursuant to that letter we filed the waiver as requested in the Government's letter and transmitted it to our tax consultant at New York, with instructions to investigate the necessity for filing that waiver and not to file it without further authority from us.

The Court. Does that refer to the fifth waiver that you have here?

Mr. Smith. That refers to the fifth waiver. Yes, Sir.

The Witness. We did not intend one waiver should take the place of the other. We had been notified by our tax consultant that it was impossible to withdraw any of these waivers; therefore, we did not attempt to withdraw them, and further followed his advice by attempting to supplant one by another, particularly in the case of our third waiver, where we sent that to definitely limit the time to the date shown.

Redirect Examination.

The waiver referred to in petitioner's Exhibit 9 was never filed with the Government by our authority. Afterwards, and about June, 1933, I learned that it had been filed. After I sent this waiver to our New York correspondent under the terms stated I tried to get in touch with the New York correspondent to find out what he had done with it, but was not successful. When I did get in touch with him he did not know what had become of the waiver. I do not remember exactly how long he remained in our employ after that time; he was engaged to perform special services in connection with a special phase of this case and after our attempt to obtain further relief under the special assessment section his work was finished when we abandoned that and reverted back to our original tax consultant.

The Court. All of those questions were also addressed to the fifth waiver, were they not?

Mr. Henry. They were.

Mr. Smith. I should like to offer in evidence—I think perhaps I had better read the motion to amend the answer, which was allowed December 3, 1934. (p. 11).

"Now comes the respondent in the above-entitled action and moves to amend its answer to the amended petition as follows:

"The respondent, not waiving its motion to amend its answer, filed on January 15, 1931, and allowed on said date, and its answer to the amended petition filed on February 16, 1931, but expressly embodying herein by reference all facts alleged in said motion (including the exhibits attached hereto) and in said answer, further answers the amended petition as follows:

"And further answering the respondent says that on December 10, 1925, the petitioner filed a waiver ex-

tending the statutory period for the assessment and collection of taxes for the year 1918 until December 31, 1926. A certified copy of said waiver is attached hereto, marked 'Exhibit F' and by reference made a part hereof."

Mr. Smith. I should like to offer in evidence a certified copy of the waiver attached to this document.

(Certified copy of waiver, December 10, 1925, marked Defendant's Exhibit A.)

The Court. The certified copy will then be a part of the pleadings and evidence also?

Mr. Smith. Yes, your Honor.

This waiver is dated December 10, 1925, and reads (p. 12):

"In pursuance of the provisions of existing Internal Revenue Laws Bertelsen and Petersen Engineering Co., a taxpayer of East Boston, Mass., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1918, under existing revenue acts, or under prior revenue acts.

"This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

BERTELSEN & PETERSEN ENG. CO.
Taxpayer
By Paul J. Bertelsen."

Thereupon the respondent offered in evidence a certified copy of a claim for refund for the year 1918, filed November 28, 1927, for the amount of $34,555.68, signed by Bertelsen & Petersen Engineering Company, by Jens Bertelsen, President. (It appears that this exhibit was not identified nor received in evidence—see top p. 13, Sten. Rec.)

Thereupon the respondent offered in evidence a (certified photostat copy of a) letter from C. B. Allen, Deputy Commissioner of Internal Revenue, to Bertelsen & Petersen Engineering Company, dated February 6, 1928, which was marked Defendant's Exhibit B and read into the record, and is as follows (p. 15):

"Your claims for refund of $34,555.68 and $34,555.68, corporation income and profits taxes for the years 1917 and 1918, respectively, have been examined.

"The contentions set forth in the brief filed in support of the claims are as follows:

"1. That the interest due you because of an overassessment for 1917 in the amount of $91,570.34 was not correctly computed.

"2. That an additional tax for 1918 amounting to $34,555.68 was never assessed, but in 1927 after the expiration of a waiver which extended the period of assessment to December 31, 1926, the additional tax for 1918 was used as an offset against the overassessment for 1917.

"As to the interest computations, the matter should be taken up with the Collector of Internal Revenue for your district.

"In regard to the 1918 assessment, the records of this office show that assessment was made on the July 1926 List #1, Page 0, Line 0. Consequently the assess-

ment was not outlawed and the adjustment made in the Collector's office was made in accordance with income tax laws and regulations.

"Your claim will, therefore, be rejected and the rejection will appear on the next schedule to be approved by the Commissioner."

Mr. Henry. I move that be excluded for the same reasons as the other.

The Court. I will exclude that and save your exception if you want it.

Mr. Smith. I would like to have my exception saved, if your Honor please.

Mr. William Swindlehurst, called as a witness by and on behalf of the respondent, after being sworn, testified as follows:

Direct Examination.

My name is William Swindlehurst. I am a clerk in the Income Tax Unit, Bureau of Internal Revenue, Washington, D. C. I have been with the Bureau of Internal Revenue since 1919. In the years 1925 and 1926 I was chief of the Additional Assessments and Records Subsection, and had charge of preparing the Commissioner's additional assessment list. It was my duty to supervise the preparation of these cases and to reach a determination of whether there was a valid waiver or whether the statute of limitations was not waived at the time of the assessment. The next step was to prepare the case for assessment and prepare the Commissioner's additional assessment list.

Thereupon the witness was handed Petitioner's Exhibit 3. The witness was referred to Petitioner's Exhibit 3, as contained on pages 33 and 34 of the transcript of the record on appeal (Plaintiff's Exhibit I), and was asked if his initials appeared anywhere on the certificate of assessment as therein shown.

The Witness. They do, in the middle of the page, just below the words "Office of Commissioner of Internal Revenue, July 3, 1926." The other initials preceding mine represent other officials who also initialed the Commissioner's assessment certificate. I am familiar with the original of this assessment certificate and the remarks on page 34 of the record (referring to Plaintiff's Exhibit 1), about three lines from the bottom of the page. These "remarks" which appear in the Commissioner's assessment list read: "1918 403152 RAR Waiver OL 1/23/26," which mean that the "1918" refers to the taxable year involved; "403152" represents the account number appearing on the tax return, income tax return; "RAR" refers to the income agent's report in the file; "Waiver" refers to the waiver in the file which was good, at least extended the statute beyond the date of the assessment which was July 3, 1926; and "OL 1/23/26" refers to an office letter dated January 23, 1926, otherwise called the "60-day letter."

The Court. Was that your writing there?

The Witness. These were my initials.

The Court. All these initials which you speak of were yours?

The Witness. Well, we only refer to one set of mine. The rest were other's initials.

The Court. Your interpretation is what the other officials meant by those symbols,

The Witness. These symbols I just read off,

The Court. Oh, no, sir. They have nothing to do with the initials we are talking about. These symbols, "1918 403152 RAR Waiver," and so on, are entered in the "Remarks" column of the assessment list.

The Court. By you:

The Witness. By the persons in my subsection, of which I had supervision.

The Court. That is your understanding! What you

have given is your understanding of what they meant when they entered those things?

The Witness. That is my understanding or knowledge of the procedure in my subsection, since I directed it.

The Witness. I supervised the assessment list with the assessment of $34,555.68 against the Bertelsen & Petersen Engineering Company which appears in the certificate on page 34 of the transcript. After the assessment list was prepared there was a second examination by what we call the administrative file and also the income tax papers and waivers. It was then compared with this Commissioner's assessment list independent of the first preparation of the case and these employees were directed to see that the entries made in the Remarks column were made from the proper returns, papers, and waivers.

The Court. Who made the check in this case?

The Witness. We have no record of that.

The Court. You don't even know who made it?

The Witness. No, sir.

The Court. You certainly cannot say whether it is an accurate check or not if you do not know who made it. Was there somebody supposed to go over them every time?

The Witness. It was a part of their duties.

The Court. It is a part of your duties, too?

The Witness. A part of their duties.

The Court. Whether they do it or not is another question, is it not?

The Witness. You mean whether they do it in each individual case

The Court. Yes.

The Witness. We have evidence that it has been done.

The Court. That it has been done?

The Witness. Yes, sir.

The Court. You ought to if you are getting paid for it. Have you also evidence it has not been done?

The Witness. I mean in this particular case. We have an income tax return prepared with some notations placed in the assessment stamp. There is a stamp placed on the return of the amount of tax due, and they fill in that stamp after they make that check. They enter on the bottom of the stamp the list, page and line, wherever that assessment appears on the list, and that appears in the income tax return for 1918 in this case, which is in the record, I believe. The next step was to prepare the Commissioner's assessment certificate, which includes all items appearing in the list, and forwarded it to the Commissioner to be signed covering all items but in one amount.

Thereupon a certified copy of claim for refund dated November 28, 1927, was marked Defendant's Exhibit C and received in evidence.

Cross Examination.

The memorandum referred to as part of Petitioner's Exhibit 3 of the record on appeal (Plaintiff's Exhibit 1) was prepared by one of the Elliott-Fisher operators in the Bureau Income Tax Unit. I did not personally prepare it nor do I have any personal recollection concerning it. I was not asked at that time to produce any waivers or to testify with respect to them.

Redirect Examination.

My initials were attached to the assessment certificate and I approved the assessment list, assessing the sum of $34,555.68 against the Bertelsen & Petersen Engineering Company.

Mr. Gerald L. MacCauley, called as a witness by and on behalf of the petitioner, after being sworn, testified as follows:

My name is Gerald L. MacCauley. I live at Belmont. My business is that of Tax Consultant. I was called into this

case by Bertelsen & Petersen Engineering Company sometime in 1924. I recall receiving a waiver from Mr. Bertelsen with instructions with respect to it. At that time I had an office in New York, which was in December, 1925. With that waiver he wrote a letter to me stating that he had received a letter from the Government requesting a waiver, and he enclosed the waiver properly executed. The date of the waiver was the early part of December, 1925. Mr. Bertelsen requested that I send it to my correspondent at Washington, who at the time did follow-up work for me in the Departments, with the request that the necessity for filing it be looked into and that the waiver not be filed without Mr. Bertelsen's express consent after I had ascertained the views of my Washington correspondent. Shortly after that something came up with regard to Mr. Bertelsen's case in comparison of values in the special relief section, and I had some disagreement with this fellow in Washington. I received no reply from him after I sent him the waiver, and these various other things were coming up continually and we just lost track of it. I did not report back to Mr. Bertelsen. I did not learn that it had not been filed until some time in 1933. Mr. Bertelsen called upon me and asked whether it had been filed or not. I made no investigation. Mr. Bertelsen found out that it had been filed after looking it up in Washington.

The above constitutes all the facts material to the issues raised by this bill of exceptions.

At the trial the respondent filed the following written motion for judgment:

> Now comes the respondent in the above-entitled action and on the pleadings and the evidence herein moves that any judgment to be entered for the plaintiff be limited to Forty-four Dollars and Seven Cents ($44.07).

The case was continued generally and, on April 22, 1936, the Court handed down a written opinion in which it made

Findings of Fact and Conclusions; denied the respondent's motion for judgment; and ordered judgment for the petitioner in the amount of $31,555.68, with the interest to be agreed upon between the parties hereto or "by a subsequent determination by this court if they are unable to agree." The respondent during the course of the trial excepted to the denial by the Court of its motion for judgment. The opinion of the Court containing its Findings of Fact and Conclusions is made a part hereof by reference.

The respondent, being aggrieved by the denial by the Court of its motion for judgment, and by its ordering judgment for the petitioner, and by the findings and rulings of the Court, now excepts to said findings and rulings of the Court, and therefore brings this bill of exceptions and prays that it may be allowed.

By its Attorneys,

FRANCIS J. W. FORD,
United States Attorney.

By: ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Assented to:
RAY HENRY,
Attorney for the Petitioner.

Allowed 10-20-1936.

GEORGE C. SWEENEY,
United States District Judge.

4146 Law
Defts Ex C
JEG Jr
1/3/36

UNITED STATES OF AMERICA
TREASURY DEPARTMENT
WASHINGTON

August 31, 1932.

PURSUANT to the provisions of Section 661, Chapter 17, Title 28 of the United States Code (Section 882 of the Revised Statutes of the United States), I hereby certify that the annexed is a true copy of Claim for Refund of $34,555.68 Income and Profits Tax for 1918, (with brief and photostat copies of letters, waivers, Agreements—Forms A, statements and copy of Certificate of Overassessment attached), filed by Bertelsen and Petersen Engineering Company, East Boston, Massachusetts, on file in this Department.

[SEAL]

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

F. A. BIRGFELD.
Chief Clerk, Treasury Department.

MM

MW WWB AMR W TS CMC B
H. C. C.

Form 66—Revised November, 1929—TREASURY DEPARTMENT, CHIEF CLERK AND SUPERINTENDENT.

U. S. GOVERNMENT PRINTING OFFICE: 1929 2—8615

(EXECUTE SEPARATE FORM FOR EACH CLAIM.)

"(ERANTS)" DEPARTMENT
[illegible]

CLAIM FOR

- ☐ ABATEMENT OF TAX ASSESSED
- ☐ CREDIT AGAINST OUTSTANDING ASSESSMENTS
- ☒ REFUND OF TAXES ILLEGALLY COLLECTED
- ☐ REFUND OF AMOUNTS PAID FOR STAMPS USED IN ERROR OR EXCESS

IMPORTANT
File with Collector of Internal Revenue before statement can be audited. Not acceptable unless completely filled in.

COLLECTOR'S NOTATION
District
Account number
Date received
Amount
Collector of Internal Revenue

NOTICE TO COLLECTOR
Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit
Stamp here

NOV 20 1922
CLAIM DY. INT. REVENUE
RECEIVED BOSTON, MASS.
NOV 28 1922

State of Massachusetts } ss.
County of Suffolk }

TYPE OR PRINT

BERTELSEN & PETERSEN ENGINEERING CO.
(Name of taxpayer as shown on return)
256 BORDER STREET
(Residence—give street and number as well as city or town and State.)
EAST BOSTON, MASS.
(Post office)

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

		YEAR
From:	Jan. 1	19 18
To	Dec. 31	19 18

1. Business in which engaged
2. Character of assessment or tax: Income and Profits Tax
(State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased — $
4. Reduction of Tax Liability requested (Income and Profits Tax) — $
5. Amount to be abated — $
6. Amount to be refunded (or such greater amount as is legally refundable) — $34,555.66
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)
(If statement covers income tax liability, items 8-11, inclusive, must be answered.)
8. District in which return (if any) was filed
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit — $
11. Unpaid assessment against which credit is asked; period from ____ to ____ — $

Deponent verily believes that this application should be allowed for the following reasons:

* Plus such larger amount as may result, plus interest.

Refund of additional taxes for this year of $34,555.68, same having been paid out of refund for 1917 thru withholding by your Department. See brief for details.

(Attach additional sheets if necessary.)

Sworn to and subscribed before me this 24th day of November, 1922

John W. Reader
Notary Public
(Title.)

Signed:
Bertelsen & Petersen Engineering Co.
Jens Bertelsen President

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

G—1176

21

202717G

Schedule No. .....

CERTIFICATES

I certify that an examination of the records of the Bureau of Internal Revenue shows the following facts as to the assessment and payment of the tax:

Name of taxpayer.	Character of assessment and period covered.	Lit.	Year.	Month.	Page.	Line.	Amount.	Date paid.	District in which paid.
	Corp Inc 1918	Reg	1922	Jul 31			$		
					99	15			
		1st Ltr	1920	July	1	1	0.01		
		4th Ltr	1920	Dec	31	8			

Thomas M. White

Collector of Internal Revenue.

Assessment Clerk, Commissioner's Office.

Claim No. .....

I certify that the records of my office show the following facts as to the purchase of stamps:

To whom sold or issued.	Kind.	Number.	Denomination.	Date of sale or issue.	Amount.	If special tax stamp, state: Serial number.	If special tax stamp, state: Period commencing—
					$		

Collector _____ District _____

Claim No. .....

Schedule Number .....

District .....

Allowed or Rejected Number .....

(Nature of tax.)

Claimant .....

Address .....

Examined and submitted for action ....., 10.....

COMMITTEE ON CLAIMS

Schedule No. .....

Claim examined by—
E. E. H

Claim approved by—

Chief of Division.

Amount claimed... $ 34 555.68

Amount allowed... $ None

Amount rejected... $ 34 555.68

B2

Hancock 2755 Boston
Washington

JAMES V. GIBLIN COMPANY
Certified Public Accountants
Audits - Taxes - Cost Systems
456 Park Square Building
Boston

Received
Jan 7 1928
Service Section

BERTELSEN AND PETERSEN ENGINEERING CO.
256 BORDER STREET,
EAST BOSTON, MASS.

November 25, 1927

Commissioner of Internal Revenue, 1917 cl #2027180
Income Tax Unit, 1918 cl #2027179
Treasury Dept.,
Washington, D. C.

The Hon. Commissioner:

This corporation advises receipt of Overassessment Certificate for 1917 in the amount of $91,570.34; against this Overassessment there were applied two deficiencies in tax for the years 1918 and 1919.

With reference to the year 1919, the said Overassessment was small and the invoice therefor duly billed this corporation, so that against the crediting of the same no protest is entered.

With reference, however, to the year 1917 and 1918, these two periods were always handled jointly by your Department, the 1919 communication being received entirely separate. The final deficiency for 1917 and 1918 under the following notation "IT:E:SM SBD—10443 A-5983" is as follows:

Year	Deficiency in Tax	Overassessment
1917		$91,570.34
1918	$34,555.68	
Net Overassessment		$57,014.66

When the Certificates of Overassessment were received, the net Overassessment had been reduced still further by the deficiency of 1919 duly assessed. Further, upon receipt of the actual Overassmessment Certificate, your Department had computed interest upon the net tax receivable, so that both the 1918 and 1919 credits had been applied, and instead of receiving interest upon the gross amount, interest was apparently paid on the 1917 Overassessment itself for one year, then on the said $57,014.66 net amount for second year, and then interest on the further reduction by the 1919 tax from the year 1920 until date of receipt.

The corporation protests in two respects at this time: First, that the 1919 assessment was duly made and properly creditable out of the 1917 refund, but that the 1918 assessment was never duly made, and hence should not be deducted from 1917. The corporation, therefore, requests refund of $34.555.68—1918 tax withheld out of the 1917 refund erroneously.

As the year 1917 is now outlawed from further additional taxes or refunds, a Refund Claim has been filed for the year 1918, in which year you have thus caused to be paid a deficiency in tax of $34,555.68 after same was outlawed. The corporation has not had its 1917 original refund rejected more than two years ago and is hence also filing a Refund Claim for 1917 as a protective measure, on the basis that the Refund Claims resulted in allowance of $34,555.68 more than was actually paid.

Secondly, in addition to asking for the return of the amount collected out of 1917 Overassessment, the corporation also requests proper computation of interest based upon the following: That the full interest be paid on the $91,570.34 Overassessment for two full years, namely, from 1918 to 1920, and that thereafter the interest be computed on the basis of the said same gross Overassessment for 1917 less

the additional tax for 1919 payable in 1920, but correctly deductible from the 1917 Overassessment.

With reference to the legal outlawing of the 1918 tax, you are advised as follows: This corporation was subjected to the usual Field Agent's inspection, which resulted in a substantial additional tax for 1917, 1918 and 1919. There was an Overassessment for 1920, copy of which is contained hereinafter. Therefore, this year is not in dispute at this writing. There were small additional taxes for the years prior to 1917 credited against 1920. The adjustment for this period is self-explanatory in the copy of the attached Overassessment Certificate.

For 1918, the relevent facts are as follows: Letter was received, dated October 25, 1924, photostated copy of which is enclosed, stating that conference would be granted November 21, 1924, and concluding with the following paragraph:—

> "In view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918, and in view of the fact that the statutory period within which the Commissioner may assess additional taxes for the year 1919, will expire presently, it is requested that renewal waivers for the years 1917 and 1918, and waiver for 1919, be executed by your corporation and forwarded to this office.
>
> "Blank forms of waivers are enclosed."

This paragraph reveals, and same comes from your office, that Waivers were originally filed for 1917 and 1918, which apparently would expire March 15, 1925.

You request in the foregoing communication Waivers for 1917, 1918 and 1919. Copy of this Waiver undated is also attached. The records in our files now show that the Waivers in question, apparently not material to the case at

this writing, were signed and executed and forwarded to you November 19, 1924. There remains in our files a copy of the 1919 Waiver only, but it is presumed that from your communication that the 1917 and 1918 Waiver was placed in one agreement, and the 1919 Waiver in another, so that you have two Waivers covering the three years. These are not material at this writing other than to give the outline prior to your notification to forward the important Waiver at issue.

In 1925, this corporation cancelled Power of Attorney to Mr. James V. Giblin and J. A. Vanden Heuvel, and gave new Power of Attorney to a Mr. McCauley. It was Mr. McCauley's intention merely to request additional Relief against the year 1918 only, not disputing the refund for 1917 nor the additional tax for 1919.

Towards the end of 1925, letter dated December 5, 1925, initialed "IT:E:SM:SBD A-5983", was received, which is also photostated herein, stating that additional Waiver was requested for 1918 only. We quote from the concluding paragraph as follows:

> "However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver."

It is noted that the foregoing Waiver would extend our case until December 31, 1926, apparently the prior Waiver extending the year 1918 taxable period only to March 15, 1926. This, again, is unimportant.

The important point is that under date of December 9, 1925, this corporation properly executed and forwarded the Waiver mentioned in your communication of December 5, 1925.

It is realized that the Waiver enclosed by you extended the time for making assessment only irrespective of determination until the end of 1926, the concluding paragraph in the said Waiver reading as follows:

> "This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board."

As this Waiver was properly prepared and forwarded to you, it was, therefore, in existence during the entire calendar year 1926. Photostated copy of the Waiver in question is enclosed, the only relevant point therein being the expiration date—December 31, 1926; shortly after the execution thereof, on December 30, 1925, this corporation requested that the Certificate of Overassessment for 1917 be forwarded and the year 1918 withheld for final determination.

A communication was received from your Department, photostated copy of which is also enclosed, initialed "IT:E:SM:SBD—10443 A-5983", in which you state that you are unable to comply with the request for separation of the two periods, inasmuch as you intend to apply the deficiency for 1918 against the Overassessment for 1917. This, we believe,

was an erroneous ruling on your part, as you forwarded the 1920 Overassessment without consideration of the three prior periods, which at that time contained net deficiencies, and you also assessed the 1919 tax while there still was a gross Overassessment for 1917. Each of these years is handled separately; despite the fact that at the time each was finally settled, there were deficiencies and Overassessments existing. The relevant paragraph therein reads as follows:

> "You are advised that this office is unable to comply with your request for the reason that any additional tax which may be found to be due for the year 1918 will be offset against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time."

Apparently, in the foregoing you intended to apply the 1918 existing deficiency against the 1917 Overassessment, which is contrary to the practice of your Department in our case, and, according to our Auditors, in all other cases, each year resting upon its own merits and the respective Law covering same and subject entirely to separate adjustments.

The withholding process, therefore, for 1918 initiated from your own Department in your letter of January 14, 1926. Your letter of January 14th was immediately followed by the important communication in this case, same being dated January 23, 1926. This was an official sixty-day notice and is photostated within. This communication denied our protests of October 15, 1925 and October 28, 1925 with reference to further Special Relief for 1918 and re-substantiated your letter dated September 16, 1925. Photostat, therefore, is enclosed of your sixty-day communication, together with the first sheet, but omitting agreements of deficiency, which are in our possession and unsigned.

The figures contained in the sixty-day letter are identical

with those appearing in the communication dated September 16, 1925. There is, therefore, photostated the self-same figures, together with final determination in the communicatcn dated September 16, 1925.

With reference to the sixty-day communication, no protest against same was entered. In the interim, February 26, 1926, the 1926 Act was passed. The new Congressional Enactment extended the sixty-day period for all pending deficiency notices to April 27, 1926. In conformity therewith, your Department further notified this corporation in letter dated March 20, 1926, photostat of which is also enclosed, that under Section 283 (c)—sixty days additional was granted. In our case, this resulted in an extension from March 23, 1926 to April 27, 1926, or approximately thirty-three days. No protest was entered thru Petition to the Tax Board either with regard to the original sixty-day notification or the extension thereto.

Meanwhile, the said Waiver dated December 9, 1925 continued, and it was presumed that in the absence of protest, assessment would subsequently follow. Nothing further was, therefore, heard from your Department with reference to same other than the tracing of our 1917 refund, which this corporation needed to such extent that it desired to hasten receipt of same. After preparation of the Certificate, exhaustion of the Appropriation prevented payment of same in October, 1926. The Overassessment was, therefore, withheld until passage of the New Act and re-appropriation by Congress. It was then remanded to the new sixty-day review file, as required under the 1926 Act, returned to the Unit, and again remanded to the sixty-day file, and finally delivered to us in October 1927, representing a whole year's delay before the actual payment of cash.

Upon analysis of actual Certificate, it revealed that you had credited the 1918 proposed deficiency of $34,555.68 out

of the year 1917, as well as having computed the interest on net yearly balances, as explained at the commencement of this brief.

Protest is entered specifically against the crediting of the 1918 tax when outlawed against 1917.

Your Department has definitely established a Regulation providing for non-application of outlawed deficiencies against legally paid refunds. With respect to this point, therefore, there is no dispute. We quote from Consolidated U. S. Income Tax Laws—Solicitor's Opinion 1095, as follows:

> "BARRED ASSESSMENTS NOT SET OFF AGAINST REFUND.—An amount refundable under Sec. 252 of the Revenue Act of 1921 cannot be applied against a tax which is not collectible, either by assessment or suit, due to the running of the statute of limitations. Although Sec. 250 (d), Act of 1921, is purely a statute of limitations, so that the right of the Government to the tax still exists and merely the remedy for collection is lost, the expression 'then due' in Sec. 252 refers to an enforceable claim of the Government and is more restricted than simply 'owing'—Sol. L. Op. 1095, I-1 C. B. 313."

The only question which arises, therefore, is whether or not the 1918 deficiency is outlawed and uncollectible, hence not possible of credit application against 1917. The sole fact in the case in view of the foregoing Regulation is that the 1918 tax was never assessed, hence uncollectible.

The single fact upon which the corporation relies is that the Commissioner thru his Agent, the Collector, never actually assessed the tax. The undersigned and the corporation's attorney, Mr. J. V. Giblin, upon receipt of the Overassessment Certificate, net, immediately advised the Collector that no assessment had ever been made. The Collector's records

also immediately revealed that said assessment had never been actually made.

It appears that in August 1926, in accordance with the Collector's records and our Overassessment Certificate, your Department thru its agency merely credited the 1918 tax against the 1917 refund. The only official notification of the assessment is your letter of September 16, 1925 and your sixty-day communication of January 23, 1926.

Your Regulations are clear that if a sixty-day notification is received within the period of limitations, then legal assessment may follow. However, the said assessment must follow within one hundred and twenty days. Inasmuch as it appears from the 1926 Regulations that the sixty-day notification is not an assessment we quote from Section 273 (c) as follows:

> "If the taxpayer does not file a petition with the Board within the time prescribed in subdivision (a) of this section, the deficiency, notice of which has been mailed to the taxpayer, shall be assessed, and shall be paid upon notice and demand from the Collector."

It is noted from the wording of the foregoing that the sixty-day communication is merely a notification of proposed deficiency and that it must be supplemented by an actual assessment. If protest is entered against the sixty-day letter, then the Commissioner is forbidden from actual assessment until such time as decision is rendered by the Board. It is conceded in the instant case that the sixty-day letter was duly forwarded within the limitation period.

Section 277 (b) provides as follows:

> "(b) The running of the statute of limitations provided in this section or in section 278 on the making of assessments and the beginning of distraint or a pro-

ceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under subdivision (a) of section 274) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court, and for 60 days thereafter."

It appears from the foregoing, therefore, that when duly notified thru a sixty-day letter, the Commissioner apparently has sixty days additional in which to assess if no protest is entered and sixty days after final determination to assess if protest is entered. Not having offered protest, the Commissioner would have until April 27, 1926 plus sixty days in this case as a maximum period, or approximately June 26, 1926, within which to assess, except that Waiver existed during the entire year 1926.

It now appears that no assessment was ever made, but that in conformity with your own insistence in your letter of January 14, 1926, in which you refused to close 1917 completely and separately, the amount was credited. To this date, the corporation has thus not received an actual physical assessment notification, and consultation with the Collector's Office reveals that no such notification was ever forwarded to the corporation. The corporation is of the opinion that actual assessment, as distinguished from theoretical assessment thru credit, cannot be made at this late date, as the Waiver expired December 31, 1926.

The taxpayer did not know of the credit application against 1917 until actual receipt of Overassessment Certificate in net amount in October 1927, therefore, did not know during 1926 that your Department had not assessed the tax other than there was a complete absence of the receipt of the assessment.

In addition to alleging that the corporation has not been duly assessed, hence the amount deducted from 1917 has been illegally withheld, the corporation requests that interest be

computed on the complete 1917 Overassessment less only the 1919 admittedly legal assessment.

Immediate hearing on the foregoing is requested in order that the corporation may present suit in Federal Court if the two legal adjustments aforementioned are not conceded by your Department.

Respectfully submitted,

BERTELSEN AND PETERSEN ENGINEERING CO.

By JENS BERTELSEN, *President.*

The foregoing subscribed and sworn to before me this 26th day of November, 1927.

JOHN W. VEADER, (SEAL)

Notary Public.

TREASURY DEPARTMENT

WASHINGTON

[SEAL]

Office of

Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:CA:2113-4

Oct 25 1924

Bertelson & Petersen Engineering Co.,
256 Border St.,
East Boston, Mass.

Sirs:

Receipt is acknowledged of letter dated October 16, 1924, of J. A. Vanden Heuvel and Company, Washington, D. C., enclosing brief covering 1918 to 1920, prepared on behalf of your corporation.

You are advised that a conference has been arranged for

1:45 o'clock, November 21, 1924, Room 114, Treasury Annex #2, Fifteenth Street and Ohio Avenue, Northwest, Washington, D. C.

In view of the early expiration of the waivers at present on file from your corporation for the years 1917 and 1918, and in view of the fact that the statutory period within which the Commissioner may assess additional taxes for the year 1919, will expire presently, it is requested that renewal waivers for the years 1917 and 1918, and waiver for 1919, be executed by your corporation and forwarded to this office.

Blank forms of waivers are enclosed.

Respectfully,

J. G. BRIGHT,
Deputy Commissioner.

By JOHN G. KENNEY,
Chief of Section.

P.J.B.
Enclosures:
3 waiver forms.

_____

(Date)

INCOME AND PROFITS TAX WAIVER

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Bertelsen & Petersen Engineering Co. of East Boston, Mass., and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or an behalf of the said ..... tax-payer ..... for the year ..... 1919 ..... under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax

Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes", approved August 5, 1909. This waiver is in effect from date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

_____

Taxpayer

By _____

Treas.

_____

Commissioner.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

Signed and sent Nov. 19, 1924

_____

[SEAL] TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:E:SM
SBD-A-5983 Dec 5 1925

Bertelsen and Petersen Engineering Company,
East Boston, Massachusetts.

Sirs:

Reference is made to your income and profits tax return for the year ended December 31, 1918, and to your protest against the rate allowed in the assessment of your profits tax under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated September 16, 1925.

Your protest is now under consideration, and you will be advised of the final determination of the tax liability at the earliest practicable date.

However, the statutory period as extended by the waiver now on file, within which the Commissioner may assess additional taxes for the year 1918, will expire presently and in order to avoid the necessity of making an assessment prior to such consideration, it is requested that you sign and return to this office within ten days from the date of this letter the enclosed waiver for the year 1918, by which you will note that you agree to an extension of time within which additional taxes may be assessed, if any are found to be due, to December 31, 1926, except as provided in the form of waiver.

In your letter of transmittal, please refer to IT:E:SM, SBD-A-5983.

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By LESLIE GILLIS,
Acting Chief of Section.

(74M)

TREASURY DEPARTMENT

Internal Revenue Service

Form 872A

INCOME AND PROFITS TAX WAIVER

FOR TAXABLE YEARS ENDED PRIOR TO JANUARY 1, 1922

IT:E:SM

SBD:A—5983

....., 192

In pursuance of the provisions of existing Internal Revenue Laws Bertelsen and Petersen Engineering Co., a tax-payer of East Boston, Mass., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said tax-payer for the year 1918, under existing revenue acts, or under prior revenue acts.

This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

Assessment after June 2, 1924.

6 more years to collect.

Sent to MacCauley Dec 10/25

.....

Taxpayer

By .....

.....

Commissioner

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[SEAL]

TREASURY DEPARTMENT
WASHINGTON

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:E:SM
SBD-10443
A-5983

Jan 14 1926

Bertelsen and Petersen Engineering Company,
256 Border Street,,
East Boston, Mass.

Sirs:

Receipt is acknowledged of your letter dated December 30, 1925, wherein you state that you accept the adjustment indicated in Bureau letter dated September 16, 1925 for the year 1917, resulting in an overassessment of $91,570.34 and request that the 1917 case be closed without waiting for the final determination of your tax liability for the year 1918.

You are advised that this office is unable to comply with your request for the reason that any additional tax which may be found to be due for the year 1918 will be offset

against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time.

Any further communication relative to this case should bear the symbols IT:E:SM-SBD-10443, A-5983.

Respectfully,

C. R. NASH,

Assistant to the Commissioner.

By LESLIE GULLS,

Acting Chief of Section.

JB
P.J.B.

TREASURY DEPARTMENT

WASHINGTON

OFFICE OF
COMMISSIONER OF INTERNAL REVENUE

IT:R: [redacted]
[redacted]
[redacted]

JAN 23 1926

Bartelsen and Petersen Engineering Company,

[redacted] Boston, Massachusetts.

Sirs:

An audit of your income and profits tax returns for the years 1917 and 1918 has resulted in the determination of a deficiency in tax of $84,566.68 for the year 1918 and an overassessment for the year 1917 of $91,870.34, as shown in the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal contesting in whole or in part the correctness of this determination. Any such appeal must be addressed to the United States Board of Tax Appeals, Washington, D. C., and must be mailed in time to reach that Board within the 60-day period.

Where a taxpayer has been given an opportunity to appeal to the Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of [redacted]. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,

D. H. BLAIR

Commissioner

By [redacted]

Inclosures:
Statements
Agreement - Form A

[redacted]

B25

TREASURY DEPARTMENT
Bureau of Internal Revenue
Form 866—Aug., 1924

Form A

In re: Bertelsen and Petersen Engineering Co.,
East Boston, Massachusetts.

AGREEMENT CONSENTING TO ASSESSMENT OF A DEFICIENCY

The undersigned taxpayer hereby waives the right of appeal under Section 274 (a) of the Revenue Act of 1924 with respect to the items listed below* and consents to the immediate assessment of the deficiency in tax resulting therefrom. These items are included in a deficiency in tax aggregating $ 24,988.68 as indicated by letter from the Commissioner of Internal Revenue, Washington, D. C., dated JAN 2 2 19[illegible], bearing the symbols IT:E:88-4CD A-8965, or as indicated in the report of the Revenue Agent in Charge at ..... dated .....

(Attach additional sheets if necessary)

(Corporate seal to be affixed; if no seal, so state)

_____
(Name)

_____
(Address)

Date _____ By _____

*Where the taxpayer consents to the assessment of the entire amount of the deficiency shown by the letter from the Commissioner or as indicated in the report of the Revenue Agent in Charge, the items need not be listed; reference may be made to the letter or report.

Note.—This agreement is subject to the approval of the Commissioner and is not an agreement as provided under Section 3760, Revenue Act of 1924.

AB-1

This copy to be retained by taxpayer.

826

TREASURY DEPARTMENT
Bureau of Internal Revenue
Form 2285—Aug., 1929

In re: Bertelsen and Petersen Engineering Co.,
East Boston, Massachusetts.

Form A

AGREEMENT CONSENTING TO ASSESSMENT OF A DEFICIENCY

The undersigned taxpayer hereby waives the right of appeal under Section 274 (a) of the Revenue Act of 1924 with respect to the items listed below and consents to the immediate assessment of the deficiency in tax resulting therefrom. These items are included in a deficiency in tax aggregating $ 34,288.68 as indicated by letter from the Commissioner of Internal Revenue, Washington, D. C., dated Nov. , bearing the symbols IT:E:EM:IOD 885-10643 A-8483, or as indicated in the report of the Revenue Agent in Charge at

dated

(Attach additional sheets if necessary)

(Corporate seal to be affixed; if no seal, so state)

(Name)

(Address)

Date By

*Where the taxpayer consents to the assessment of the entire amount of the deficiency shown by the letter from the Commissioner or as indicated in the report of the Revenue Agent in Charge, the items need not be listed; reference may be made to the letter or report.

Note.—This agreement is subject to the approval of the Commissioner and is not an agreement as provided under Section 3760, Revenue Act of 1924.

827

STATEMENT.

IT:E:SM:60D
SBD—10443
A—5983

In re: Bertelsen and Petersen Engineering Company,
East Boston, Massachusetts.

Years Examined.	*Deficiency in Tax.*	*Overassessment.*
1917		$91,570.34
1918	$34,556.68	
Net overassessment		$57,014.66

Reference is made to your protest dated October 15, 1925, and to supplemental brief filed October 28, 1925, against the allowance of your application for assessment of your profits tax for the year 1918 under the provisions of Section 328 of the Revenue Act of 1918, as set forth in Bureau letter dated September 16, 1925.

After a careful review of your protest and of all the evidence submitted in support of your contentions, you are advised that the Bureau holds that the allowance of your application is based on a comparison with representative concerns, similarly circumstanced, as nearly as may be, to your company. Accordingly, the conditions set forth in the above-mentioned letter are sustained.

In addition to the rejection of the claims referred to in Bureau letter dated September 16, 1925, your two claims for the refund of $40,000.00 each, for the year 1917 and 1918, respectively, will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a certificate of overassessment which will reach you in due course through the office of the Collector of Internal

Revenue for your district and will be applied by that official in accordance with Section 281 (a) of the Revenue Act of 1924.

The right of appeal to the United States Board of Tax Appeals as indicated on page one of this letter, refers only to any deficiency intact indicated herein, inasmuch as there is no provision in the Revenue Act of 1924 granting the right of appeal against the determination of any overassessment found upon an audit of your returns.

A copy of this letter is being forwarded to your representative, Mr. J. A. Vanden Heuvel, 203-205 Metropolitan Bank Building, Washington, D. C.

JB

IFWORSM
SED-10443
A-5983

STATEMENT

In re: Bertelsen and Petersen Engineering Co.,
East Boston, Massachusetts

Year	Deficiency in Tax	Overassessment
1917		$91,570.34
1918	$34,555.68	

Net Overassessment $57,014.66

You are advised that after careful consideration and review, your application under the provisions of Sections 210 and 327 for assessment of your profits tax as prescribed by Sections 210 and 328 of the Revenue Acts of 1917 and 1918, respectively, has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which, in the aggregate, may be said to be engaged in a like or similar trade or business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

1917

Net Income

Net income shown by field investigation	$432,711.71

Computation of Tax

Excess profits tax (Section 210)		$177,198.46
Net income as above	$432,711.71	
Less:		
Excess profits tax	177,198.46	
Amount taxable at 2%	$255,513.26	5,110.33
Amount taxable at 4%	255,513.26	10,220.66
Total tax assessable		$192,526.43
Tax previously assessed:		
Original, Account #1782847, April, 1918, List, Page 1395, Line 17,		$277,586.23
Additional, August, 1920, List, Page 31, Line 1,		6,510.54
Total tax assessed		$284,096.77
Total tax due		192,526.43
Overassessment		$ 91,570.34

829

In re: Bertelsen and Petersen Engineering Co.

In accordance with the above conclusions, your claims for the refund of $46,718.09 and $75,000.00, aggregating $121,718.09, will be rejected for $30,144.76.

1918

Net Income

Net income shown in Bureau letter dated December 23, 1924.			$399,389.29

Computation of Tax

Profits Tax (Section 328)			$260,308.85
Net income as above		$399,389.29	
Less:			
Profits tax	$260,308.85		
Exemption	2,000.00	262,308.85	
Amount taxable at 12½		$137,080.44	16,449.65
Total tax assessable			$276,758.50
Tax previously assessed:			
Original, Account #4C3152,		$242,384.72	
Less:			
Interest		345.15	
		$242,039.57	
Addition, August, 1920, List, Page 31, Line 2,		163.25	242,202.82
Deficiency in Tax			$ 34,555.68

In accordance with the above conclusions, your claims for the refund of $51,173.67 and $75,000.00, aggregating $126,173.67, will be rejected in full.

The Collector of Internal Revenue for your district will be officially notified of the rejection.

The overassessment shown above will be made the subject of a Certificate of Overassessment which will reach you in due course through the office of the Collector of Internal Revenue for your district and will be applied by that official in accordance with Section 281(a) of the Revenue Act of 1924.

830

(84)

[SEAL]

TREASURY DEPARTMENT
WASHINGTON

March 20, 1926.

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:R:P:7
Bertelsen and Petersen Engineering Company,
East Boston, Massachusetts.

Sir(s) or Madam:

Re: Office letter dated January 23, 1926.

Reference is made to the office letter under the above-mentioned date and your attention is invited to Section 283(c) of the Revenue Act of 1926, which reads as follows:

"If before the enactment of this Act the Commissioner has mailed to any person a notice under sudivision (a) of Section 274 of the Revenue Act of 1924 (whether in respect of a tax imposed by Title II of such act or in respect of so much of an income, war-profits, or excess profits tax imposed by any of the prior Acts enumerated in subdivision (a) of this section as was not assessed before June 3, 1924), and if the 60-day period referred to in such subdivision has not expired before the enactment of this Act and no appeal has been filed before the enactment of this Act, such person may file a petition with the Board in the same manner as if a notice of deficiency had been mailed after the enactment of this Act in respect of a deficiency in a tax imposed by this title. In such cases the 60-day period referred to in subdivision (a) of Section 274 of this Act

shall begin on the date of the enactment of this Act, and the powers, duties, rights, and privileges of the Commissioner and of the person entitled to file the petition, and the jurisdiction of the Board and of the courts, shall, whether or not the petition is filed, be determined, and the computation of the tax shall be made, in the same manner as provided in subdivision (a) of this section."

Respectfully,

C. R. NASH,
Assistant to the Commissioner.
By W. S. SHERWOOD,
Head of Division.

COPY

TREASURY DEPARTMENT
Office of
Commissioner of Internal Revenue
WASHINGTON

Income Tax Unit
IT:R:CC—

CERTIFICATE OF OVERASSESSMENT
Number: 821629

Bertelson and Petersen Engineering Co.,
256 Border Street,
East Boston, Massachusetts

Allowed: $1137.31
Schedule No. 13847

Sirs:

An audit of your income tax return, Form 1120, and a consideration of all the claims (if any) filed by you for the year 1920 indicates that the tax assessed for this year was in excess of the amount due:

Tax assessed:	
Original assessment, Account #406220	$2668.55
Tax assessable	1531.24
Tax overassessed	$1137.31

The overassessment indicated above results from adjustments made in the revenue agent's report, a copy of which has been furnished you. Small error in income shown on page 23 of the revenue agent's report has been corrected.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

Respectfully,
J. G. BRIGHT
Deputy Commissioner.

Instructions Executed By
(Signed) F. R. CLUTE,
Head of Division.

Signature
M. E. NICHOLS
Collector Int. Rev.
J.H.R.
..... District
of Mass.

Credited: $90.98, $182.76, $318.15, $398.22, $147.20
Year: 1913 Addl., 1914 Addl., 1915 Addl., 1916 Addl., 1919 Addl.
Acct. No. Mar. '25 P. 1 L.4-C, Mar '25 P. 1 L.8-C, Mar '25 P.1 L.5-C, Mar '25 P.1 L.6-C Mar '25 P. 1 L.7-C
Interest: $229.56

DEFENDANT'S ASSIGNMENT OF ERRORS.

[FILED FEBRUARY 18, 1937.]

COMES NOW the United States of America, defendant in the above-entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal herewith petitioned for in said cause, from the judgment of this Court entered on the 30th day of November 1936:

I. That the Court erred in ordering judgment to be entered in favor of the plaintiff and against the defendant.

II. That the Court erred in refusing to grant defendant's motion for judgment filed at the close of the evidence.

III. That the Court erred in that the special findings of fact made and entered by the Court do not support the judgment entered pursuant to its order.

IV. That the Court erred in holding that the deficiency assessment of $34,555.68, made by the Commissioner of Internal Revenue against the plaintiff for the year 1918, was not made within the statutory period of limitation as extended by any waiver, or waivers, then on file with the Bureau of Internal Revenue.

V. That the Court erred by not holding that the plaintiff was estopped to deny that the waiver, executed by the plaintiff on December 10, 1925, and familiarly known as the "Fifth Waiver," was filed with the Bureau of Internal Revenue without its authority.

VI. That the Court erred by holding that the liability of the plaintiff for the deficiency assessment of $34,555.68 to the United States became extinguished.

VII. That the Court erred by assuming jurisdiction to try and determine the controversy between the plaintiff and the defendant herein.

WHEREFORE, defendant prays that the judgment heretofore rendered by the District Court herein be reversed and that the said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiff's petition.

FRANCIS J. W. FORD,
United States Attorney, Attorney for the defendant.
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

A citation on appeal was issued on February 18, 1937, and was made returnable in the U. S. Circuit Court of Appeals for the First Circuit on March 19, 1937. Service of said citation was duly acknowledged on behalf of the plaintiff.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.:

I, JAMES S. ALLEN, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on the appeal of the United States of America from the judgment entered November 30, 1936, on proceedings after Mandate, including true copies of such proofs, entries and papers on file as have been agreed upon in the cause entitled,

No. 4146, LAW DOCKET,

BERTELSEN & PETERSEN ENGINEERING CO.,
PLAINTIFF,

v.

UNITED STATES OF AMERICA,
DEFENDANT,

in said District Court determined.

And I further certify that transmitted herewith are the

originals of the petition for appeal and the citation on appeal with the acknowledgment of service thereon.

[SEAL]

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District this sixth day of April, A. D. 1937.

JAMES S. ALLEN, *Clerk.*

[MEMORANDUM. An order of enlargement of time for docketing case to, and including, April 17, 1937, is here omitted. A. I. CHARRON, *Clerk.*]

PROCEEDINGS IN CIRCUIT COURT OF APPEALS

On February 15, 1938, this cause came on to be heard and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the eighteenth day of March, A. D. 1938, the following Opinion of the Court was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3243. October Term, 1937

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court

March 18, 1938

WILSON, J.: This is an action by a taxpayer to recover the sum of $34,555.68 with interest as a part of an overpayment of $91,570.34 for income and excess profits taxes for the year 1917, which overpayment had been allowed by the Commissioner.

On July 27, 1926, the Commissioner assessed a deficiency tax against the plaintiff of $34,555.68 for the year 1918, and under Sec. 284 of the Revenue Act of 1926 credited against such deficiency assessment the above amount, being a part of the overpayment already allowed for the 1917 taxes. The plaintiff contends that the deficiency assessment made on July 27, 1926, was unauthorized and unlawful, and that it is entitled to recover the above sum, being a balance of the overpayment of the 1917 taxes, which had been allowed by the Commissioner. The case was heard by the District Court, a jury being waived.

While this case had previously been before this court on appeal and was remanded to the District Court for further proceedings in accordance with the opinion of this court, 60 Fed. (2d) 745, the question of the jurisdiction of the District Court is raised by the government for the first time in this court under its present assignment of errors.

We think there is no merit in the government's contention. Its contention is based on Sec. 24 (5) (20) of the Judicial Code as

amended. Sub-section (20) of Sec. 24 provides that District Courts have concurrent jurisdiction with the Court of Claims of all claims against the United States, where the amount in controversy is not in excess of $10,000; and also of any suit or proceeding commenced after the passage of the Revenue Act of 1921 for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws in excess of $10,000, if the collector of internal revenue by whom such tax or sum was collected is dead, or was not in office as collector of internal revenue at the time such suit or proceeding was commenced. United States v. Piedmont Mfg. Co., 89 Fed. (2d) 296, 300; United States v. Reeves Bros. Co., 83 Fed. (2d) 121, 122.

It is admitted that the collector who collected the 1917 tax was, at the time of the filing of this petition in 1929, either dead or out of office. The government contends that this action is governed by Sec. 3226, R. S., but we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax. The District Court so held. The government's contention on this point is without merit. United States v. Piedmont Mfg. Co., supra, p. 300.

The other assignments of error by the government raise the question of whether a "fifth waiver" filed with the Bureau in December, 1925, was effective to extend the time for assessing the 1918 tax to December 31, 1926; and whether the judgment is supported by the findings of fact by the District Court.

The District Court in its opinion under a heading, "Findings of Fact," found that four waivers previous to that of December 1925 had been filed with the Bureau, which extended the time for assessing the taxes for 1918 to February 27, 1926. Whether or not these findings can be considered special findings within the meaning of Sec. 700, R. S., no exception was taken thereto and no question of law is raised before this court as to the sufficiency of the evidence to support them.

Therefore, to sustain the validity of the deficiency tax which was assessed on July 27, 1926, the waiver filed in December 1925 must be held to be a valid waiver. Sec. 278 (c) of the Revenue Act of 1924 requires that both the taxpayer and the Commissioner consent in writing to any assessment of a tax after the period prescribed in Sec. 277 of the 1924 Act.

It is agreed that the fifth waiver filed in December 1925 was not signed by the Commissioner. While there is some difference in the decided cases as to whether the signature of the Commissioner is essential to the validity of a waiver, it has been so held in the case of Commissioner v. United States Ref. Corp., 64 Fed. (2d) 69, which was affirmed by an equally divided court in 290 U. S. 591; and again in the case of S. S. Pierce Company v. United States, it was decided by this court on December 8, 1927, that the signature of the Commissioner, in some form, assenting to a waiver by a taxpayer was essential to its validity.

In R. H. Stearns Co. v. United States, 291 U. S. 54, while it was ecognized that the assent of the Commissioner must be indicated n writing in some manner, it was held that his assent might be nferred from a notation on the official schedule of assessments signed y the Commissioner on which appeared a notation specifically refer- ing to and identifying the waiver in that case.

The District Court in its opinion under a heading "Conclusions" ound that there was no such notation in this case that could be ound to refer to the fifth waiver. This finding was clearly a general nding of fact, or a mixed question of law and fact to which no xception was taken by the government. The evidence on which it as based cannot be reviewed in this court. Fleischmann Co. v. nited States, 270 U. S. 349, 355–6.

No exceptions were taken to any rulings by the District Court uring the progress of the trial, except as to the admission of evi- ence, which are not included in the government's assignments of rror. Exceptions contained in a bill of exceptions filed long after he case is heard and judgment rendered do not relate back to the rial. Fleischmann Co. v. United States, supra; United States v. mith, 39 Fed. (2d) 851, 854; Arthur C. Harvey Co. v. Malley, 60 ed. (2d) 97, affirmed 288 U. S. 415.

In Fleischmann Co. v. United States, supra, the court said:

"It is settled by repeated decisions, that in the absence of special ndings, the general finding of the court is conclusive upon all mat- rs of fact and prevents any inquiry into the conclusions of law mbodied therein, except in so far as the rulings during the progress f the trial were excepted to and duly preserved by bill of exceptions, s required by the statute. [Citing cases.] To obtain a review by n appellate court of the conclusions of law a party must either ob- ain from the trial court special findings which raise the legal propo- itions, or present the propositions of law to the court and obtain a uling on them. • • • That is, he should request special findings f fact by the court, framed like a special verdict of a jury, and then eserve his exceptions to those special findings, if he deems them not o be sustained by any evidence; and if he wishes to except to the onclusions of law drawn by the court from the facts found he should ave them separately stated and excepted to. In this way, and in this ay only, is it possible for him to review completely the action of he court below upon the merits'."

An examination of the record and the opinion of the District ourt clearly discloses that the findings of fact contained in its pinion, whether intended as special findings of fact under Sec. 700 . S., are not findings of all the ultimate facts from which the judg- ent can be said to follow as a matter of law; therefore an exception o the denial of a motion for judgment would raise no question of law n this court. Wilson v. Merchants' Loan & Trust Co. of Chicago, 3 U. S. 121, 126, 127.

The motion of the defendant that a judgment for the plaintiff, if ndered, should not exceed $44.07, cannot be sustained as a motion for

a judgment for the defendant. There was no evidence before the District Court at the second hearing on which such a judgment could be found. Therefore an exception taken to the denial thereof raises no question of law for this court.

The motion was evidently based on the finding of the District Court at the prior trial that an error had been made in the computation of interest. At the second trial it was stipulated, if judgment was found for the plaintiff for the amount sued for, how the interest should be computed.

Except on the issue of jurisdiction of the subject matter, which is always open and may be raised at any state of the proceedings, the defendant has failed to take the proper steps in this case to raise questions of law before this court. Fleischmann Co. v. United States, supra, p. 356.

The judgment of the District Court is affirmed.

On the same date, to wit, March 18, 1938, the following Judgment was entered:

Judgment

March 18, 1938

This cause came on to be heard February 15, 1938, upon the transcript of record of the District Court of the United States for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now, to wit, March 18, 1938, here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on the first day of April, A. D. 1938, the following petition for rehearing was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3243. October Term, 1937

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BERTHELSEN & PETERSEN ENGINEERING COMPANY, PLAINTIFF, APPELLEE

On Appeal from the District Court of the United States for the District of Massachusetts

Petition for rehearing

To the Honorable United States Circuit Court of Appeals for the First Circuit, and the Judges thereof:

Now comes the United States of America, the appellant in the above-entitled cause, wherein this Court, on March 18, 1938, rendered

its opinion holding adversely to the appellant and affirmed the decision of the District Court of the United States for the District of Massachusetts, and, by its attorneys, presents this petition for rehearing.

This petition is not being filed as additional argument upon a contention heretofore specifically presented by the Government. During the hearing before this Court the matter of jurisdiction unexpectedly turned to the reliance by the taxpayer upon an account stated as the basis for its claim. The point made herein is that, if the suit is upon an account stated, then the Court of Claims unquestionably would have had sole jurisdiction.

In support hereof the appellant respectfully shows to this Honorable Court the following:

When this cause was before this Court on the former appeal (60 F. (2d) 745), it was considered by the Court as a case involving an illegal collection for the year 1918. In the second decision, the Court held that the action was for the recovery of the withheld allowed overpayment for the year 1917, "and not for an illegal collection of a 1918 tax." As an action for the withheld part of the allowed overpayment for 1917, the action (as discussed on page 20 of appellant's brief) was originally predicated upon a claim for refund filed November 28, 1927, which was not timely filed; and, therefore, the action was not brought within five years from the date of the payment of the tax or within two years after the final action of the Commissioner upon any valid claim for a refund. However, the Court decided that Section 3226 of the Revised Statutes can have no application when the taxpayer sues on an allowed claim, which is tantamount to holding that when the Commissioner allowed the claim, the withheld portion of the allowed claim ceased to be an internal revenue tax erroneously or illegally assessed. But subsection 20 of Section 24 of the Judicial Code does not give a district court concurrent jurisdiction with the Court of Claims when the amount is over $10,000, unless the suit is for the recovery of an internal revenue tax alleged to have been erroneously or illegally assessed or collected.

The appellee, in its contention that its suit was not for the overpayment of a tax but was based upon a certificate of overassessment, and for that reason Section 3226 of the Revised Statutes did not apply, cited no authority therefor except the following four cases which originated in the Court of Claims of the United States (Br. 25):

Kaufman v. United States, 96 U. S. 567.

United States v. Real Estate Savings Bank, 104 U. S. 728.

Bonwit Teller & Co. v. United States, 283 U. S. 258.

Parks & Woolson Machine Co. v. United States, 58 F. (2d) 868; certiorari denied, 53 S. Ct. 85.

In Kaufman v. United States, supra, it was merely held that the Court of Claims had jurisdiction of an action to recover an unpaid allowance made by the Commissioner. In United States v. Real Estate Savings Bank, supra, the Supreme Court of the United States, upon

holding that the Court of Claims had jurisdiction of a claim allowed by the Commissioner, said (p. 734):

"A rejected claim may be prosecuted against collector, and an allowed claim, not paid, may be sued for in the Court of Claims."

While that case was decided prior to the amendment of Section 24 of the Judicial Code, there is nothing in the amendment that affects the application of the Real Estate Savings Bank case to the instant case. In Bonwit Teller & Co. v. United States, supra, the taxpayer pleaded its claim in two forms: The first was based upon the Commissioner's certificate of overassessment; the other on an account stated. The Supreme Court held that, upon the delivery of the certificate to the plaintiff, there arose the cause of action upon which the suit was brought and the suit was not barred; but, as stated before, this suit arose in the Court of Claims. In Parks & Woolson Machine Co. v. United States, supra, the Court of Claims held that the issuance of a certificate of overassessment created an account stated in favor of the plaintiff and against the United States.

The appellee commenced and pursued its alleged right to collect $34,555.68 in an alternative fashion; that is to say, as a wrongfully withheld portion of an allowed overpayment for 1917, or as an illegal collection for 1918. In each contention it relied upon the rejection of a claim for refund; and not until the hearing upon this appeal did the appellee contend that its right to recover was in the nature of an action on an account stated. Nevertheless, its reliance now upon the Commissioner's certificate of overassessment is only the more indicative that it should have gone into the Court of Claims instead of into a district court of the United States to present its case against the Government.

We know of no decided case where the right to recover more than $10,000 against the United States on an account stated, or a certificate of overassessment, was allowed by a district court.

In United States v. Tacoma Oriental S. S. Co., 86 F. (2d) 363 (C. C. A. 9th), the action was brought to compel the United States to pay past and future earnings, amounting to more than $10,000, arising under a mail contract. In holding that the district court did not have jurisdiction against the United States when the amount was over $10,000, the appellate court said (p. 369):

"Appellants [United States] have assigned as error the denial of the special appearance filed by the United States. They argue that actions, against the United States, based upon contracts, may be brought in either the District Courts or the Court of Claims, where the amount involved does not exceed $10,000." 28 U. S. C. A. Sec. 41 (20); 28 U. S. C. A. Sec. 250. But if the amount involved in such actions exceeds $10,000, then the Court of Claims has exclusive jurisdiction. 28 U. S. C. A. Sec. 250.

"Appellee's petition, as against the United States, asked that the latter pay to the appellee the amount due it. The petition, therefore, would be based on contract, and inasmuch as the amount involved exceeds $10,000, could be brought only in the Court of Claims. * * *"

Since this Court decided that the instant case is an action upon a certificate of overassessment, and therefore an action based upon a promise, express or implied, to pay an allowed refund, this case, under the theory of the decision, is comparable to United States v. Tacoma Oriental S. S. Co., supra.

In Gans Steamship Line v. United States, decided November 16, 1932, not officially reported, but may be found in 1932 C. C. H. vol. 3, par. 9523, the District Court of the United States for the Southern District of New York held, in a memorandum opinion, that a suit against the United States for the recovery of more than $10,000 on a certificate of overassessment was a suit based upon a promise to pay an allowed refund and was not within the amendment to the "Tucker Act" giving a district court jurisdiction of suits to recover "any internal revenue tax alleged to have been erroneously or illegally assessed or collected." The decision of the District Court was affirmed by a per curiam opinion of the Circuit Court of Appeals for the Second Circuit, 65 F. (2d) 1016, and certiorari was denied by the Supreme Court of the United States, 290 U. S. 657. The unpublished opinion of the District Court is as follows:

"Coxe, District Judge: This is a suit against the United States for $216,469.05 on a certificate of over-assessment, dated Oct. 28, 1925, relating to 1917 taxes. It is, therefore, based on 'an implied promise to pay the allowed refund.' (Moses v. U. S., decided by the C. C. A. 2d circuit, Nov. 14, 1932; U. S. v. Savings Bank, 104 U. S. 728; Bonwit Teller v. U. S., 283 U. S. 258). The suit is not one for the recovery of taxes 'erroneously or illegally assessed or collected,' which could have been maintained against the Collector while in office; Cary v. Curtis, 3 How. 236; dissenting opinion of Mr. Justice Story; Smietanka v. Indiana, 257 U. S. 1; International v. Burrill, 260 Fed. 664; and it, therefore, is not within the amendment to the Tucker act giving the District Court jurisdiction of suits to recover 'any internal-revenue tax alleged to have been erroneously or illegally assessed or collected * * * even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead, or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.'" (42 Stat. 311; 43 Stat. 972; Schwab v. U. S., 17 Fed. (2) 34; Smietanka v. Indiana (supra); Moses v. U. S. (supra). Inasmuch as the present suit is for more than $10,000, it cannot be maintained in the District Court.

The Government's motion to dismiss for lack of jurisdiction is, therefore, granted.

In First National Bank v. United States, 2 Fed. Supp. 107 (E. D. Mo.), one of the questions involved was whether a district court has jurisdiction in an action against the United States on a certificate of overassessment exceeding $10,000. In discussing the question of jurisdiction the court said (p. 109):

"Second, I am very doubtful whether I have jurisdiction to enforce an account stated, in a case wherein more than the sum of $10,000 is involved. Resort, in such cases, seems uniformly to have been had

to the Court of Claims, which I think would have jurisdiction. While this court has jurisdiction in matters of actions to compel refund of taxes unjustly and unlawfully exacted and collected, yet, when the fact of illegal exaction and collection and the right to a refund, with the amount thereof, are agreed to between the United States and the taxpayer, an account stated arises, and suit upon it can, in my opinion, be maintained (when the amount claimed exceeds $10,000) only in the Court of Claims."

In Otis Elevator Co. v. United States, 18 Fed. Supp. 87 (S. D. N. Y.), the action, which was against the United States for more than $10,000, arose on a pleading setting forth that by a certificate of overassessment the Commissioner of Internal Revenue stated an account relative to income tax payments that showed a balance in favor of the petitioner. The court, in holding that it did not have jurisdiction, said (p. 88):

"(1) The District Court has no jurisdiction under the Tucker Act to hear a case against the United States on account stated where the amount involved exceeds $10,000. Such a suit is plainly outside of the general scope of the act, because it involves more than $10,000. It is also outside of the amendment of November 23, 1921, permitting the maintenance of suit exceeding $10,000 where the claim is for recovery of internal revenue tax and where the collector collecting the tax is dead or out of office; this because that amendment embraces only cases that might have been brought against the collector if still in office, and a suit on account stated could not have been brought against the collector." These propositions were settled by Moses v. United States, 61 F. (2d) 791 (C. C. A. 2), certiorari denied, 289 U. S. 743, 53 S. Ct. 689, 77 L. Ed. 1490.

In Moses v. United States, 61 F. (2d) 791 (C. C. A. 2d), an overassessment was determined and allowed for 1916. Later the Commissioner caused to be paid to the taxpayer $28,872.23, and credited the balance of $32,516.36 for the year 1915. Several years later, the taxpayer commenced an action in the district court for the recovery of the $32,516.36 on the theory that the assessment of the additional tax for 1915 was barred by the statute of limitations. The court held that unless the suit was one that could be brought against a collector, it was not within the jurisdiction conferred on district courts by the amendment (Sec. 24 (20) of the Judicial Code), which allowed suits to be brought against the United States, when the collector is dead or out of office, in the district courts for the recovery of any internal revenue tax alleged to have been erroneously collected. Part of the opinion is as follows (p. 793):

"Accepting the appellants' theory of their suit, the cause of action is grounded upon the Commissioner's determination evidenced by his certificate of overassessment. Bonwit Teller & Co. v. United States, 283 U. S. 258, * * *. The liability of the United States rests upon an implied promise to pay the allowed refund. United States v. Real Estate Savings Bank, 104 U. S. 728 * * *. United States v. Kaufman, 96 U. S. 567 * * *. But no such cause of action

can arise against a collector. He can neither allow a refund nor draw money from the Treasury to pay it. Hence no suit will lie against him based on the allowance of a refund." [Citing and quoting from Arthur C. Harvey Co. v. Malley, 60 F. (2d) 97 (C. C. A. 1st).]

* * * * * * *

"In the case at bar, the plaintiffs proved facts which created a contractual obligation on the part of the United States to pay over the allowed refund, and a breach of that obligation by retention of $52,000 for an unjustifiable reason; i. e., the illegally assessed additional tax for 1915. They urge that, regardless of the legal theory upon which their suit is based, it is a suit for a 'tax alleged to have been erroneously or illegally assessed or collected,' and so within the letter of the amendment expanding the District Court's jurisdiction. But the theory of the suit determines whether it is one which would lie against a collector if he were alive and in office; and, if it be not such a suit, then, for reasons already stated, we are satisfied that the amendment does not cover it. * * *"

To the same effect, see Lowe Bros. Co. v. United States, 92 F. (2d) 905 (C. C. A. 6th) pending on certiorari. Semble (p. 347), United States v. Elgin Nat. Watch Co., 65 F. (2d) 344 (C. C. A. 7th).

The only cases cited by this Court as bearing upon the jurisdictional question are United States v. Piedmont Mfg. Co., 89 F. (2d) 296 (C. C. A. 4th), and United States v. Reeves Bros. Co., 83 F. (2d) 121 (C. C. A. 6th). The Piedmont Mfg. Co. case was brought and decided on the theory of an illegal collection of taxes, part of which was paid by credits from other years, and involved a statute (Sec. 284 (c) of the Revenue Act of 1926, 44 Stat. 9, 66) making an exception respecting a claim for a refund where the Commissioner decreased invested capital of the taxpayer due to his failure to take adequate deductions in prior years. The Piedmont case did not involve an account stated. The Reeves Bros. Co. case was also brought in a district court of the United States for an illegal collection of a tax, and the United States Circuit Court of Appeals for the Sixth Circuit held that, since the amount involved was more than $10,000, the District Court did not have jurisdiction.

Whether the instant case was decided upon the theory of an account stated as commonly understood, or on an implied promise to pay the balance of the allowed refund evidenced by the certificate of overassessment for the year 1917, under neither theory can it be said that the suit is one for the recovery of taxes "erroneously or illegally assessed or collected"; and since the amount involved is over $10,000, only the Court of Claims would have had jurisdiction of the controversy. We know of no case other than the instant one where the contrary ever has been held.

Wherefore, in view of the foregoing, the appellant respectfully requests that its petition for rehearing be granted by this Honorable Court.

In view of the importance of the question here presented, it is respectfully requested that this Court, in the event of denial of this petition, give its reasons therefor.

Respectfully submitted.

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
L. W. POST,
F. A. MICHELS,
Special Assistants to the Attorney General.
FRANCIS J. W. FORD,
United States Attorney,
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Certificate of counsel

The United States of America, appellant herein, by its attorneys, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

FRANCIS J. W. FORD,
United States Attorney.
By ARTHUR L. MURRAY,
Special Assistant to the United States Attorney.

Thereafter, to wit, on April 14, 1938, the following Order of Court was entered:

Order of court

April 14, 1938

The petition for rehearing is granted only on the question of jurisdiction.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on June 24, 1938, this cause came on to be heard upon rehearing and was fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson, and Honorable James M. Morton, Jr., Circuit Judges, sitting.

Thereafter, to wit, on the thirteenth day of July A. D. 1938, the following Opinion of the Court on Rehearing was filed:

United States Circuit Court of Appeals for the First Circuit

No. 3243. October Term, 1937

UNITED STATES OF AMERICA, DEFENDANT, APPELLANT

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY, PLAINTIFF, APPELLEE

Appeal from the District Court of the United States for the District of Massachusetts

Before BINGHAM, WILSON, and MORTON, JJ.

Opinion of the court on rehearing

July 13, 1938

WILSON, J.: This is a petition for a rehearing in the above entitled cause. The case was heard a second time by this court on appeal from the District Court of Massachusetts, and the judgment of the District Court was affirmed.

The issues raised on this appeal by the assignments of error were whether a deficiency assessment of $34,555.68 made by the Commissioner of Internal Revenue for the year 1918 was made within the statutory period of limitation, as extended by certain waivers filed by the taxpayer. The government also for the first time raised the question in its assignments of error as to whether the District Court had jurisdiction of the cause, relying on Sec. 24 (5) (20) of the Judicial Code as amended.

This court held that a fifth waiver filed in December 1925, which purported to extend the time for the assessment of the 1918 tax to December 31, 1926, was ineffective, since it was not assented to by the Commissioner in writing, and that the assessment of the deficiency tax for 1918 on July 27, 1926, was therefore void.

The petition for rehearing was granted on the sole question of whether the District Court had jurisdiction to hear and decide the case.

Some confusion has arisen in the consideration of the case as to whether the taxpayer's petition was grounded on the Commissioner's certificate of overassessment in 1917 as an account stated, or on a balance due on an allowed claim. In either case it is urged by the government that the Court of Claims has sole jurisdiction of the cause. Since this is a petition for rehearing, the case is to be heard anew on the question to which the rehearing is limited. If counsel for plaintiff in their brief, or this Court in its opinion, used language which may be construed as indicating that the taxpayer's petition was based solely on the Commissioner's certificate of overpayment of the 1917 tax, either as an account stated or as an allowed claim, we think, on rehearing on the question of the jurisdiction of the District Court to hear

and determine the case, that the facts on which jurisdiction is based are opened for further consideration.

The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918.

It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. Goodrich, Admr. v. Coffin, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund.

On November 25, 1927, the taxpayer wrote the Commissioner that, inasmuch as its original claim for refund for 1917 as to the part now sued for had been rejected within two years, it was filing a refund claim for that part of the 1917 overpayment erroneously applied to a deficiency tax for 1918 as a protective measure; and on November 28, 1927, the taxpayer renewed its claim for a refund of $34,555.68 as an overpayment of its 1917 tax by filing with the Commissioner of Internal Revenue a specific claim for the amount under Sec. 3226 R. S. as amended by Sec. 1113 of the Revenue Act of 1926, to which claim the suit of the taxpayer relates, the receipt of which claim was acknowledged by the Commissioner.

On February 6, 1928, the Commissioner of Internal Revenue notified the taxpayer by letter that its claim of November 28, 1927, had been examined and would be rejected, which rejection would appear on the next schedule approved by the Commissioner.

The chairman of the Special Advisory Committee of the Bureau of Internal Revenue in a memorandum furnished the taxpayer stated relative to its alternative claims for 1917 and 1918 filed November 28, 1927, that: "The claims were considered on the merits and in a Bureau letter dated February 6, 1928, they were proposed for rejection." They were officially rejected on February 28, 1928.

Within two years from the final disallowance of said claims on February 28, 1928, the taxpayer on September 19, 1929, filed a petition in the District Court for the District of Massachusetts to recover the sum of $34,555.68 with interest, which it alleged had been erroneously disallowed.

In the case of Jones v. United States, 5 Fed. Supp. 146, 152, the Court of Claims held:

"That a reconsideration of a refund claim on the merits constitutes a reopening of the claim is no longer open to doubt. Mobile Drug Co. v. United States (D. C.), 39 F. (2d) 940, and McKesson & Robbins, Inc. v. Edwards (C. C. A.), 57 F. (2d) 147. These cases announce the rule that when the Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decision thereon rejecting the claim, or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and announced his final decision, and the taxpayer, under section 3226 of the Revised Statutes, as amended (26 U. S. C. A., Sec. 156), has two years thereafter in which to institute suit. * * * There must be an actual reconsideration of the case, and the final decision must be upon the merits of the claim. Ford Motor Co. v. United States (Ct. Cl.), 3 F. Supp. 423; Hickman v. United States (D. C.), 47 F. (2d) 328. We think this case clearly illustrates what constitutes the reconsideration of a claim for refund. It meets in every respect the requirement that the claim must be reconsidered and decided upon its merits."

In the case of Southwestern Oil & Gas Company v. United States, 29 Fed (2d) 404, 406, certiorari denied 280 U. S. 601, the Court said:

"The plaintiff * * * further contends that the date of the Commissioner's final rejection of its claim was not April 28, 1925, but August 31, 1927, as the Commissioner, pursuant to plaintiff's request made prior to the expiration of two years following the original rejection, had reopened the judgment and reconsidered the claim. We find that the last of these contentions to be sustained by the findings of fact, and that the claim was actually reopened and reconsidered, and finally decided on August 31, 1927, and consequently plaintiff's action is not barred by section 3226, R. S., as re-enacted by section 1113 of the Revenue Act of 1926, and section 281 (a) and (b) of the Revenue Act of 1924. * * *"

In Pacific Mills v. Nichols, 72 Fed. (2d) 103, 107, the Court said:

"In the present case, even if the Commissioner should be held to have decided every claim under the taxpayer's original petition, on March 26, 1927, when the second claim was filed, two years had not elapsed since the rejection of the first claim; it was still open to the plaintiff to sue on the denial of the first claim and to the Commissioner to reconsider his decision on the first claim and permit it to be amended and reheard."

Also see Pratt & Whitney Co. v. United States, 6 Fed. Supp. 574; United States v. Memphis Cotton Oil Co., 288 U. S. 62, 66.

The government having admitted all the jurisdictional facts except those authorizing the District Court to hear such a case, the facts appearing in the record demonstrate that the suit was one which could have been brought against a Collector, if living, but who is now dead or out of office.

We think the contention of the taxpayer must be sustained, viz: that the filing of the second claim for refund on November 28, 1927,

and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. (amended by Sec. 1113 of the 1926 Revenue Act); Jones v. United States, supra, p. 132; Southwestern Oil & Gas Company v. United States, supra, p. 406; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1938, and the suit of the taxpayer was filed within two years, or on September 19, 1929.

The case of Lowe Bros. v. United States, 92 Fed. (2d) 905, affirmed by the Supreme Court on May 16, 1938, does not militate against the taxpayer's right of recovery in this case, since the tax for the year in question in that case was not collected by a collector who was dead or out of office, as the 1917 tax had been in this case, but was in effect collected by the Commissioner of Internal Revenue by applying an overpayment as a credit on taxes for a prior year, which the Commissioner attempted to do in this case for an alleged deficiency tax for 1918.

Upon a reconsideration of the facts and the briefs on rehearing, we think this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918.

On rehearing the judgment of the District Court will stand affirmed.

On the same day, to wit, July 13, 1938, the following Order of Court was entered:

Order of court

July 13, 1938

On rehearing the judgment of the District Court will stand affirmed.

By the Court.

ARTHUR I. CHARRON, *Clerk.*

Thereafter, to wit, on the thirteenth day of August A. D. 1938, mandate issued to the District Court.

Clerk's certificate

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the foregoing pages numbered 1 to 90, inclusive, contain and are a true copy of the record and all proceedings to and including October 7, 1938, in the cause in said court numbered and entitled, No. 3243, United States of America, Defendant, Appellant, v. Bertelsen & Petersen Engineering Company, Plaintiff, Appellee.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventh day of October A. D. 1938.

[SEAL] ARTHUR I. CHANDON, *Clerk.*

Supreme Court of the United States

Order allowing certiorari

Filed November 21, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration and decision of this application.

CLERK'S COPY.

P.Y.

162

175244
S. C.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 437

THE UNITED STATES OF AMERICA, PETITIONER

vs.

C. T. JAFFRAY, R. H. M. ROBINSON AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 25, 1938
CERTIORARI GRANTED NOVEMBER 21, 1938

United States Circuit Court of Appe

EIGHTH CIRCUIT.

No. 11,023

AT LAW.

UNITED STATES OF AMERICA, APPELLANT,

vs.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 27, 1937.

INDEX.

	Original	Print
Petition	1	1
Exhibit A, Notice to C. T. Jaffray, et al., of disallowance of claims for refund of taxes for the years 1922 to 1924	20	15
Exhibit B, Notice to C. T. Jaffray, et al., of disallowance of claims for refund of taxes for the years 1925 and 1928	21	16
Exhibit C, Certificate of Over-assessment of C. T. Jaffray, et al., for the year 1922	23	17

	Original	Print
Exhibit D, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1923	24	18
Exhibit E, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1924	25	20
Exhibit F, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1925	27	22
Exhibit G, Agreement between Minnesota and Ontario Paper Company and others, and the Commissioner of Internal Revenue as to final determination of tax liability	29	23
Exhibit H, Computation prepared by representatives of the Commissioner and of the Minnesota and Ontario Paper Company and its affiliates relating to consolidated taxable net income as finally determined	33	29
Exhibit I, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1926	41	45
Exhibit J, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1927	42	46
Exhibit K, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1928	43	47
Exhibit L, Claim of C. T. Jaffray, et al., for refund of tax	45	49
Affidavit of service of Petition on United States Attorney	47	51
Affidavit of service of Petition on Attorney General of the United States	48	51
Demurrer of Defendant to Complaint and Marshal's return of Service	49	52
Order granting leave to amend Petition	51	53
Motion of Plaintiffs for leave to amend Petition	52	53
Order sustaining Demurrer of Defendant to Complaint; Plaintiffs granted leave to file Amended Complaint, July 1, 1935	54	55
Petition of Plaintiffs for Rehearing of Order sustaining Demurrer to Complaint	67	63
Order granting Petition for Rehearing and setting same for Argument.	72	67
Order modifying Order of July 1, 1935, and overruling Demurrer of Defendant to Complaint, etc.	73	68
Answer	78	70
Reply	85	75
Order amending Petition	87	75
Motion of Plaintiffs for leave to amend Petition	88	76
Findings of Fact and Conclusions of Law of District Court	89	76
Memorandum Opinion	129	103
Judgment, April 9, 1937	169	127
Bill of Exceptions	170	128
Caption	170	128
Motion of Plaintiffs for leave to amend Petition	170	128
Motion of Defendant to dismiss and overruling thereof	173	130
Recital of allowance of Amendment to Petition	176	132
Stipulation of Facts	178	133
Exhibit A, Petition in the case of Minnesota and Ontario Paper Company vs. Levi M. Willcuts, Collector, etc., No. 2245, Law.	197	148
Exhibit B, Answer in the case of Minnesota and Ontario Paper Company vs. Levi M. Willcuts, Collector, etc., No. 2245, Law.	202	151
Exhibit C, Stipulation of Facts in connection with appeals of Minnesota and Ontario Paper Company and its affiliate corporations before United States Board of Tax Appeals	204	152

	Original	Print
Exhibit D, Order of Redetermination of United States Board of Tax Appeals on the appeal of Minnesota and Ontario Paper Company, No. 2128	215	161
Exhibit E, Order of Redetermination of United States Board of Tax Appeals on the appeal of Minnesota and Ontario Paper Company, No. 2127	216	161
Exhibit F, Order of Redetermination of United States Board of Tax Appeals on the appeal of Minnesota and Ontario Paper Company, No. 2699	217	162
Exhibit G, Computation prepared by representatives of the Commissioner and of the Minnesota and Ontario Paper Company and its affiliates relating to consolidated taxable net income as finally determined	218	163
Exhibit H, Assessment Certificate of Commissioner of Internal Revenue relating to additional assessments against Minnesota and Ontario Paper Company, March 6, 1926	226	179
Exhibit I, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1926	228	183
Exhibit J, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1927	230	187
Exhibit K, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1928	232	191
Exhibit L, Claim of C. T. Jaffray, et al., for refund of tax	235	195
Exhibit M, Petition for Order authorizing Receivers to enter into agreement with Commissioner of Internal Revenue relating to income tax liability in the case of Wirt Wilson and Company vs. Minnesota and Ontario Paper Company, No. 1950, Equity	237	196
Exhibit A, Intervening Complaint of Collector of Internal Revenue	247	203
Exhibit B, Agreement between Minnesota and Ontario Paper Company and others, and the Commissioner of Internal Revenue as to final determination of tax liability	248	207
Exhibit C, Stipulation for dismissal in the case of Minnesota and Ontario Paper Company vs. Levi M. Willcuts, Collector, etc., No. 2245, Law	252	209
Exhibit D, Stipulation as to tax liability in the case of International Lumber Company vs. Commissioner of Internal Revenue in United States Board of Tax Appeals, No. 41834.	253	209
Exhibit E, Stipulation as to tax liability in the case of Minnesota and Ontario Paper Company vs. Commissioner of Internal Revenue in United States Board of Tax Appeals, No. 52110	254	210
Exhibit F, Stipulation as to tax liability in the case of Minnesota and Ontario Paper Company vs. Commissioner of Internal Revenue in United States Board of Tax Appeals, No. 51134	255	211
Exhibit G, Stipulation as to withholding of income taxes for holders of bonds of Minnesota and Ontario Paper Company	256	211
Exhibit H, Stipulation for dismissal in the case of Minnesota and Ontario Paper Company vs. United States of America in the Court of Claims, No. K-436	257	212

	Original	Print
Exhibit I, Stipulation for dismissal in the case of International Lumber Company vs. United States of America in the Court of Claims, No. K-437	258	212
Exhibit N, Order authorising Receivers to enter into agreement with Commissioner of Internal Revenue relating to income tax liability in the case of Wirt Wilson and Company vs. Minnesota and Ontario Paper Company, No. 1950, Equity.	259	213
Exhibit O, Agreement between Minnesota and Ontario Paper Company and others, and the Commissioner of Internal Revenue as to final determination of tax liability	262	214
Exhibit P, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1922	266	219
Exhibit Q, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1923	269	223
Exhibit R, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1924	271	227
Exhibit S, Certificate of over-assessment of C. T. Jaffray, et al., for the year 1925	273	231
Exhibit T, Schedule of over-assessments relating to Minnesota and Ontario Paper Company	276	235
Exhibit U, Notice to C. T. Jaffray, et al., of disallowance of claims for refund of taxes for the years 1922 to 1924	277	239
Exhibit V, Notice to C. T. Jaffray, et al., of disallowance of claims for refund of taxes for the years 1925 to 1928	278	240
Exhibit W, Form of Annual Return of normal income tax to be paid at source	279	241
Exhibit X, Annual return of Minnesota and Ontario Paper Company for the year 1921	280	243
Objections of Plaintiffs to certain portions of Stipulation of Facts.	281	245
Testimony for Trustees	283	247
Ralph D. Main	283	247
Plaintiffs' Exhibits	286	249
1, Letter, E. W. Backus to A. D. George, October 12, 1923.	286	249
2, Letter, G. Sherman Collins to A. D. George, November 10, 1923	286	249
3, Letter, G. Sherman Collins to A. D. George, December 3, 1923	286	249
4, Letter, R. D. Main to A. D. George, July 17, 1924	286	249
5, Letter, Fort Frances Pulp & Paper Company, George McLean, to Fort Frances Pulp & Paper Company, Minneapolis, Attention R. D. Main, May 12, 1926	288	251
6, Letter, H. A. Tibbetts to George McLean, May 11, 1926.	288	252
7, Letter, C. R. Fitch to Fort Frances Pulp & Paper Company, Ltd., May 15, 1926	288	252
8, Letter, J. W. Walker to Ontario and Minnesota Power Company, Ltd., July 7, 1926	289	253
8-A and 8-B, Tax Notices	289	253
9, Letter, H. E. Marr to Fort Frances Pulp and Paper Company, August 2, 1926	289	253
10, Pencil Memorandum of Computation of tax referred to in Plaintiff's Exhibit 9	290	253
11, Letter, J. A. Alexander to Fort Frances Pulp & Paper Company, August 20, 1926	290	254
11-A and 11-B, Notice of sale of timber	290	254

	Original	Print
12, Annual tax return of Fort Frances Pulp & Paper Company, Ltd., for the year 1926	291	255
13, Letter, H. E. Marr to Fort Frances Pulp & Paper Company, Ltd	291	255
14, Letter, Inspector of Income Tax for the Dominion of Canada to Fort Frances Pulp & Paper Company, Ltd., April 16, 1927	292	256
15, Letter, Ralph D. Main to G. W. Kurtz, August 23, 1927.	292	256
12-A to 12-D, Receipts for payment of income tax by Fort Frances Pulp and Paper Company, Ltd	293	257
16, File of letters between Fort Frances Pulp & Paper Company, Ltd., and Dominion of Canada tax officials relating to 1923 assessment	293	257
Motion of Defendant to strike testimony of R. D. Main and denial thereof	299	262
Stipulation of parties that testimony offered in case No. 3391 Law, and in the claim of United States Collector of Internal Revenue in consolidated proceedings No. 11640 may be offered in either case, etc	299	262
Renewal of Motion of Defendant to Dismiss and overruling thereof.	302	264
Motion of Defendant for Judgment	303	265
Motion of Plaintiff for Judgment	309	269
Stipulation in Consolidated Proceedings for Reorganization in the Matter of Minnesota and Ontario Paper Company, No. 11,640.	311	270
Exhibit A, Agreement between Fort Frances Pulp and Paper Company, Ltd., and Minnesota & Ontario Paper Company, January 1, 1920	328	281
Exhibit B, Invoice, Fort Frances Pulp & Paper Company, Ltd. to Minnesota & Ontario Paper Company, December 22, 1923.	329	283
Exhibit C, Consumption entry papers covering shipment from Fort Frances Pulp & Paper Company, Ltd., to Minnesota & Ontario Paper Company	330	285
Exhibit D, Sales Agreement of Minnesota & Ontario Paper Company	332	289
Exhibit E, Statements relating to Interest Credits of Minnesota & Ontario Paper Company	334	293
Exhibit F, Withholding income tax return of Minnesota & Ontario Paper Company for the year 1927 filed February 14, 1928	337	295
Exhibit G, Withholding income tax return of Minnesota & Ontario Paper Company for the year 1927 filed March 1, 1928.	339	299
Exhibit H, Withholding income tax return of Minnesota & Ontario Paper Company for the year 1927 filed March 3, 1928.	342	305
Exhibit I, Withholding income tax return of Minnesota & Ontario Paper Company for the year 1927 filed March 3, 1928.	343	307
Exhibit J, Withholding income tax return relating to Minnesota & Ontario Paper Company for the year 1927 filed by Commissioner of Internal Revenue	345	311
Exhibit K, Withholding income tax return relating to Minnesota & Ontario Paper Company for the year 1926 filed by Commissioner of Internal Revenue	346	313
Renewal of Motions of Defendant to dismiss and for Judgment	347	315
Recital as to time for filing briefs	347	315
Request of Defendant for Findings of Fact and Conclusions of Law.	348	315

	Original	Print
Recital of overruling of Motion of Defendant to dismiss	360	325
Recital of overruling of Motion of Defendant for Judgment	360	326
Recital of refusal to grant Defendant's request for Findings of Fact and Conclusions of Law	360	326
Request of Plaintiffs for Conclusions of Law and refusal thereof	360	326
Recital of entry of Judgment in favor of Plaintiffs	360	326
Recital of extension of time to file Bill of Exceptions	360	326
Stipulation of counsel approving Bill of Exceptions	361	327
Approval of Bill of Exceptions by District Judge	361	327
Notice of Appeal and Marshal's return of Service	363	328
Assignment of Errors	365	329
Order allowing Appeal	376	337
Petition for Appeal	377	338
Telegram, James W. Morris to George F. Sullivan, July 1, 1937	378	338
Citation and Marshal's Returns of Service	379	339
Order extending time to file Transcript	385	341
Stipulation as to Contents of Transcript	386	342
Election as to printing of Record	387	343
Clerk's Certificate to Transcript	388	344
Proceedings in U. S. C. C. A., Eighth Circuit		345
Appearances of counsel		345
Order of submission		346
Opinion, Sanborn, J		346
Judgment		355
Petition for rehearing		355
Order denying petition for rehearing		358
Clerk's certificate		358
Order allowing certiorari		360

1 Petition.

In The District Court of The United States In and for The District of Minnesota, Fourth Division.

C. T. Jaffray and R. H. M. Robinson, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,

No. 3391. vs. At Law.

United States of America, Defendant.

Come now plaintiffs and bring this their petition against defendant and allege:

I.

This is a proceeding brought under the provisions of the Judicial Code, Section 24 (20), as amended, for the recovery of internal-revenue taxes erroneously and illegally assessed and collected. The taxes sought to be recovered were all paid to and collected by one Levi M. Willcuts as the duly appointed, qualified, and acting collector of internal revenue for the district of Minnesota. Willcuts was such collector from June 1, 1921, to July 31, 1933, inclusive. Since the latter date he has not been and is not now in office as collector of internal revenue.

Whenever in this petition the word "collector" is used, reference is made to said Willcuts as collector of internal revenue for the district of Minnesota.

2 II.

Plaintiffs now are and at all times since July 11, 1934, have been, pursuant to an order of this Court that date made and entered under The Corporate Bankruptcy Act of 1934, the duly appointed, qualified, and acting trustees of the estate of Minnesota and Ontario Paper Company, debtor, hereinafter called the company, a corporation organized and existing under the laws of the State of Maine. The principal office of the company is at 1100 Builders Exchange Building, Minneapolis, Minnesota.

Plaintiff Jaffray is a resident of Minneapolis, Minnesota. Plaintiff Robinson is a resident of Tuxedo Park, Long Island, New York. Plaintiffs' office as trustees is the principal office of the company.

From November 30, 1931, until their appointment as trustees on July 11, 1934, plaintiffs were the duly appointed, qualified, and acting receivers of the company.

Plaintiffs bring this proceeding in their own behalf as trustees and in behalf of the company and its creditors and stockholders. The bringing of this proceeding is authorized by the order of this Court wherein plaintiffs were appointed such trustees.

III.

From 1917 to 1920, inclusive, the company owned shares of capital stock in and for income-tax purposes was affiliated with the following corporations: International Lumber Company, Rainy River Improvement Company, Minnesota, Dakota and Western Railway Company, Falls Lumber and Coal Company, Watrous Island Boom Company, and International Insulation Company. From 1921 to 1925, inclusive, the company owned shares of capital stock in and for income-tax purposes was affiliated with said named corporations except International Insulation Company. From 1926 to 1928, inclusive, the company owned shares of capital stock in
3 and for income-tax purposes was affiliated with all said named corporations together with Minnesota Forest Products Company, a corporation.

During each of said three periods the annual earnings of the company and its affiliates were consolidated for income-tax purposes. All taxes paid on such consolidated earnings have been paid by the company.

IV.

a. On March 14, 1923, the company filed with the collector a tentative return of the consolidated net income of itself and affiliates for the year 1922, and at the time of such filing paid to the collector $17,500 in part payment of such estimated tax.

On June 15, 1923, the company filed with the collector a completed return of the 1922 consolidated net income of itself and affiliates. Said completed return showed a tax of $66,818.77, which amount, except for the payment of $17,500 already made, was paid to the collector as follows:

June 15, 1923	$15,909.39
September 15, 1923	16,704.70
December 15, 1923	16,704.68

b. On June 4, 1927, the company filed with the collector a claim for refund of the entire amount of $66,818.77 paid to him as income tax for 1922. On April 30, 1929, a perfected claim for refund of said tax was filed with the collector.

V.

a. On March 15, 1924, the company filed with the collector a tentative return of the consolidated net income of itself and affiliates for 1923, and at the time of such filing
4 paid to the collector $58,000 in part payment of such estimated tax. On June 14, 1924, the company filed with the collector a completed return of the 1923 consolidated net income of itself and affiliates. Said completed return showed a tax of $166,352.88, which amount, except for the payment of $58,000 already made, was paid to the collector as follows:

June 14, 1924	$25,176.44
September 14, 1924	41,588.22
December 14, 1924	41,588.22

b. On July 21, 1927, the company filed with the collector a claim for refund of $110,241.81 of the $166,352.88 paid to him as income tax for 1923. On or about December 10, 1928, an amended claim for refund was filed with the collector wherein the amount of 1923 taxes claimed as refundable was reduced to $86,355.86. On April 30, 1929, a perfected claim for refund was filed with the collector wherein refund was again claimed of $86,355.86.

VI.

a. On March 14, 1925, the company filed with the collector a tentative return of the consolidated net income of itself and affiliates for 1924, and at the time of such filing paid to the collector $15,000 in part payment of such estimated tax. On June 15, 1925, the company filed with the collector a completed return of the 1924 consolidated net income of itself and affiliates. Said completed return showed a tax of $70,926.94, which amount, except for the payment of $15,000 already made, was paid to the collector as follows:

June 15, 1925	$20,463.47
September 14, 1925	17,731.74
December 14, 1925	17,731.73

5 b. On December 24, 1927, the company filed with the collector a claim for refund of $36,904.69 of the $70,926.94 paid to him as income tax for 1924. On March 13, 1929, the company filed with the collector an amended claim

for refund wherein the amount of 1924 taxes claimed as refundable was reduced to $29,882.76. On April 30, 1929, the company filed with the collector a perfected claim for refund wherein the amount of 1924 taxes claimed as refundable was increased to $49,670.56.

VII.

a. On March 13, 1926, the company filed with the collector a tentative return of the consolidated net income of itself and affiliates for 1925, and at the time of such filing paid to the collector $10,000 in payment of such estimated tax. On June 1, 1926, the company filed with the collector a completed return of the 1925 consolidated net income of itself and affiliates. Said completed return showed a tax of $9,365.77, which amount was less than the sum already paid by $634.23, which last amount defendant refunded to the company on October 23, 1926.

b. On December 24, 1927, the company filed with the collector a claim for refund of $8,515.30 of the $9,365.77 paid to him as income tax for 1925. On March 13, 1929, the company filed with the collector an amended claim for refund wherein the amount of 1925 taxes claimed as refundable was reduced to $6,401.49. On April 30, 1929, the company filed with the collector a perfected claim for refund wherein the amount of 1925 taxes claimed as refundable was further reduced to $3,400.75.

VIII.

Under date of August 31, 1933, the commissioner of internal revenue, hereinafter called the commissioner, sent to plaintiffs as receivers of the company two letters. True
6 copies of said letters are hereto attached as Exhibit A and Exhibit B and by reference are made parts hereof. Exhibit A relates to the claims for refund filed in respect of the taxes paid for 1922 to 1924, inclusive, as aforesaid. Exhibit B relates, among other things, to the claims for refunds filed in respect of the taxes paid for 1925 as aforesaid. By said letters, Exhibits A and B, plaintiffs as receivers of the company were notified that all the claims for refund filed by the company with the collector as hereinbefore stated had been disallowed on a schedule dated July 13, 1933, to the extent indicated in certificates of over-assessment numbered 2011190, 2014278, 2030102, and 2029738. True copies of said certificates of overassessment are hereto attached as Exhibit C, Exhibit D, Exhibit E, and Exhibit F, respectively, and by reference are made parts hereof.

IX.

By certificate of overassessment 2011190, Exhibit C, the commissioner determined that the entire amount of the tax for 1922, $66,818.77, had been overpaid, that refund of $17,500 thereof was barred by the statute of limitations, that $49,318.77, the remainder, would be credited in the amounts of $42,884 and $6,434.77 against additional income taxes claimed by the commissioner to be owing by the company for 1926 and 1927, respectively, and that $24,034.76 in interest, which interest was computed upon $15,909.39 of said $49,318.77 from June 14, 1923, to October 31, 1931, upon $16,704.70 of said $49,318.77 from September 15, 1923, to October 31, 1931, and upon $16,704.68 of said $49,318.77 from December 15, 1923, to October 31, 1931, would be credited against withholding taxes claimed by the commissioner to be owing by the company for 1921. Such credits were made on or about July 13, 1933.

7

X.

By certificate of overassessment 2014278, Exhibit D, the commissioner determined that the tax for 1923 had been overpaid in the amount of $29,427.69, that such overpayment would be credited against additional income taxes claimed by the commissioner to be owing by the company for 1927, and that $12,142.75 in interest, which interest was computed upon said $29,427.69 from December 15, 1924, to October 31, 1931, would be credited in the amounts of $1,235.69 and $10,907.06 against withholding taxes claimed by the commissioner to be owing by the company for 1921 and 1922, respectively. Such credits were made on or about July 13, 1933, except that the credit of $10,907.06, instead of being made against withholding taxes claimed for 1922, was made against withholding taxes claimed for 1930 and 1931.

XI.

By certificate of overassessment 2030102, Exhibit E, the commissioner determined that the tax for 1924 had been overpaid in the amount of $23,904.23, that such overpayment would be credited in the amounts of $11,582.66 and $12,321.57 against additional income taxes claimed by the commissioner to be owing by the company for 1927 and 1928, respectively, and that $8,521.94 in interest, which interest was computed upon $6,172.50 of said $23.904.23 from September 15, 1925, to October 31, 1931, and upon $17,731.73 of said $23,904.23 from December 15, 1925, to October 31, 1931, would be credited against withholding taxes claimed by the commissioner to be owing by the company for 1922. Such credits were made

on or about July 13, 1933, except that the credit of interest, instead of being made against withholding taxes claimed for 1922, was made against withholding taxes claimed by the commissioner to be owing in the amount of $3,038.92 for 1921 and in the amount of $5,483.02 for 1930 and 1931.

8 XII.

By certificate of overassessment 2029738, Exhibit F, the commissioner determined that the tax for 1925 had been overpaid in the amount of $7,800, that such overpayment would be credited in the amount of $5,851.44 against withholding taxes claimed by the commissioner to be owing by the company for 1921 and in the amount of $1,948.56 against additional income taxes claimed by the commissioner to be owing by the company for 1928, and that $3,227.31 in interest, which interest was computed upon $1,948.56 of said amount of $7,800 from March 15, 1926, until October 31, 1931, and computed upon $5,851.44 of said amount of $7,800 from March 15, 1926, until July 10, 1933, would be credited, in the respective amounts of $2,831.25 and $396.06, against withholding taxes claimed by the commissioner to be owing by the company for 1922. Such credits were made on or about July 13, 1933, except that the credit of $5,851.44, instead of being made against withholding taxes claimed for 1921, was made against withholding taxes claimed for 1930 and 1931, and except that the credit of interest was reduced from a total of $3,227.31 to a total of $2,501.09 and as so reduced was made against withholding taxes claimed for 1921.

XIII.

A true copy of the settlement agreement referred to in Exhibits C and D is hereto attached as Exhibit G and by reference is made a part hereof.

XIV.

The credits of $42,884 and $6,434.77 applied in accordance with certificate of overassessment 2011190, Exhibit C, from the 1922 overpayment against additional income taxes claimed for 1926 and 1927, respectively, the credit of $29,427.69 applied in accordance with certificate of overassessment

9 2014278, Exhibit D, from the 1923 overpayment against additional income taxes claimed for 1927, the credits of $11,582.66 and $12,321.57 applied in accordance with certificate of overassessment 2030102, Exhibit E, against additional income taxes claimed for 1927 and 1928, respectively, and the credit of $1,948.56 applied in accordance with certificate of overassessment 2029738, Exhibit F, against income taxes

claimed for 1928, together with the collection of $8,276.92 by the collector on April 23, 1930, hereinafter more fully set out, were and are erroneous and unlawful by reason of the following facts:

a. In February, 1921, and March, 1924, the commissioner assessed an aggregate amount of $759,838.91 as additional taxes upon the 1917 consolidated income of the company and its affiliates. In March, 1924, the commissioner assessed $884,665.66 as additional taxes upon the 1918 consolidated income of the company and its affiliates. Claims for abatement of $497,111.21 of the 1917 assessment were rejected on February 4, 1925. A claim for abatement of the 1918 assessment was rejected January 23, 1925. On January 23, 1925, the commissioner notified the company and its affiliates of his determination of deficiencies of $613,248.82 and $1,403,435.47 in taxes upon the consolidated income of the company and its affiliates for 1919 and 1920, respectively. On February 21, 1925, the company and its affiliates filed petitions with the United States Board of Tax Appeals contesting the assessment of the additional taxes asserted for 1917 and 1918. On March 19, 1925, the company and its affiliates filed petitions with the Board for redetermination of the deficiencies determined for 1919 and 1920.

b. While said proceedings were pending before the Board, the company and its affiliates held conferences with the commissioner and other representatives of the Treasury Department for the purpose of ascertaining and agreeing upon the correct amount of tax owing for each of said years 1917 to 1920, inclusive. In said conferences the facts relating to all items in dispute were ascertained and agreed upon and were embodied in a written stipulation dated February 25, 1926. The first paragraph of said stipulation was as follows:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer," by its counsel, that the deficiency in tax of said taxpayer for the taxable years 1917, 1918, 1919, and 1920 shall be determined and assessed in accordance with the following agreement.

Following that paragraph the facts ascertained and agreed upon were set out in detail as to each item in dispute. The last paragraph of said stipulation was as follows:

It is further stipulated and agreed that the understatement of the amount of the taxable net income as shown by the returns filed by the taxpayer herein for each of the taxable years 1917, 1918, 1919, and 1920 was due to negligence on the part of the taxpayer but without intent to defraud.

Said stipulation was filed with the Board February 26, 1926.

c. On February 25, 1926, the commissioner, acting through his counsel, the solicitor of internal revenue, wrote and delivered to the company the following letter:

Confirming the agreement made with the Commissioner of Internal Revenue on February 24, 1926, you are advised that the amount of the penalty to be assessed against you as the result of the negligent understatement of your tax liability for the taxable years 1917, 1918, 1919, and 1920 will be compromised by accepting a sum equal to 6 per cent per annum on the deficiencies determined and assessed in accordance with the stipulation this date entered into between the taxpayer and the representative of this office, from the date the deficiencies became due and payable to the date of payment.

11 d. On February 26, 1926, the following further written stipulation was signed and filed:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by its attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer," by its counsel, that the taxpayer's deficiency in tax for the taxable years 1917, 1918, 1919, and 1920 shall be determined by the Board of Tax Appeals in accordance with the agreement entered into between the taxpayer and the commissioner on February 25, 1926, a copy of which is hereto attached, marked "Exhibit A," and made a part of this stipulation.

The exhibit A attached to said stipulation was the written agreement referred to in subparagraph b above.

e. On February 26, 1926, the Board entered the following order in respect of said proceedings:

This appeal coming on to be heard on February 26, 1926, the taxpayer being represented by Ralph M. Shaw, Esq., and the commissioner being represented by E. C. Lake, Esq., and it appearing that the parties have entered into a certain stipulation which was filed on this date, and it appearing that the parties have agreed to compute the tax in accordance with

the stipulation aforesaid: Now, therefore, on agreement of counsel for both parties, it is

Ordered, That the tax shall be computed in accordance with the stipulation filed this date and referred to hereinabove. Final determination of the deficiency will be made under rule 50 of the board's Rules of Practice on consent of the parties or on 10 days' notice by either party to the adverse party.

f. On March 6, 1926, the following stipulation was filed with the Board:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by its attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer," by its counsel, that the amount of the deficiency due from the taxpayer or overassessment in the above-entitled appeals for each of the taxable years 1917, 1918, 1919, and 1920 is as follows:

	Tax	Penalty
1917, overassessment	$270,305.51	$227,633.03
1918, overassessment	532,722.18	139,897.55
1919, deficiency	491,360.53	165,834.19
1920, deficiency	920,772.85	255,514.47

12 On the same day, pursuant to said stipulation, the Board entered three orders determining the amount owing for each year involved. The amount owing for 1917 was covered in one order; the amount owing for 1918 was covered in another order; and the amount owing for each of the years 1919 and 1920 was covered in the third order. All the orders were similar in form and content except as to the amounts stated therein. The order relating to 1917 was as follows:

Now on the 6th day of March, 1926, the above-entitled appeal coming on to be heard on the stipulation of the taxpayer and the commissioner, signed and executed by their respective counsel, and it appearing from said stipulation and other documentary evidence submitted that the true tax liability of the Minnesota & Ontario Paper Company and its affiliated corporations for the taxable year 1917 is $531,073.65, of which the sum of $41,540.25 has heretofore been paid, and the sum of $801,379.16 has heretofore been assessed, and it further appearing that there is due a penalty of $227,633.03, no part of which has been assessed or paid:

Now therefore, it is considered and

Ordered that the amount of tax deficiency and penalty due from the taxpayer be, and the same is hereby redetermined for the year 1917 to be $489,533.40 tax and $227,633.03 penalty, and that of the tax heretofore assessed there shall be abated the sum of $270,305.51 and the amount of the penalty of $227,633.03 shall be assessed and paid.

The stipulation referred to in said order is the stipulation quoted in subparagraph f above. The "other documentary evidence" referred to in said order is a computation prepared by representatives of the commissioner and of the company and its affiliates and filed with the Board March 6, 1926; a true copy of said computation is attached as Exhibit H and by reference is made a part hereof. Said computation was made pursuant to and in accordance with the stipulation referred to in subparagraph b above and the letter of the Commissioner referred to in subparagraph c above.

g. Thereafter, pursuant to said orders of the Board, the commissioner caused the collector to make, and on March 12, 1926, the collector did make, demands upon the company for payment, as separate items, of the amount of the de-
13 ficiency and the amount of interest or so-called penalty thereon computed up to and including March 15, 1926, for each of said years 1917 to 1920, inclusive. On March 22, 1926, in compliance with said demands, the company paid to the collector $3,044,807.39, the total of said various items, of which total $791,197.13 was such interest or so-called penalty, $788,879.21 thereof being computed in and shown by sheet 6 of Exhibit H, and $2,317.92 thereof being further interest for the years 1919 and 1920, in the respective amounts of $804.33 and $1,513.59, collected and paid in accordance with Section 283(d) of the Revenue Act of 1926.

h. On June 15, 1927, the company filed with the collector a consolidated return of income for 1926 and took as a deduction $791,100.51 of said amount of $791,197.13. Said deduction, after certain adjustments thereafter made, caused a consolidated net loss of $541,822.10, upon which no tax was due or payable. The commissioner disallowed $790,455.20 of the deduction and thereby wiped out the net loss, and on October 28, 1931, he advised the company that his audit of the return disclosed a tax liability of $41,566.02, which amount, together with interest of $11,539.98, or a total of $53,106.00, was assessed on October 31, 1931. Thereafter on July 13, 1933, the commissioner issued a certain certificate of overassessment bearing the number 1316756, a true copy of which

is hereto attached as Exhibit I and by reference is made a part hereof. By said certificate $10,222.00 of the total amount assessed on October 31, 1931, as aforesaid was abated, leaving a balance on account of taxes and interest claimed as owing for 1926 as follows: income taxes, $33,565.47; interest thereon to October 31, 1931, $9,318.53; total, $42,884.00. The total amount so claimed as owing was collected and satisfied on or about July 13, 1933, by application thereto as a credit of the 1922 overpayment hereinbefore referred to, all as set out in paragraph IX above.

14 i. On June 15, 1928, the company filed with the collector a consolidated return of income for 1927. In said return the company deducted the amount of the 1926 consolidated net loss, which deduction, after certain adjustments thereafter made, resulted in a net loss for 1927 of $226,235.29. Disallowance of $790,455.20 of the deduction for 1926, all as set forth in subparagraph h above, wiped out the net loss for said year and deprived the company of its right to apply the same against 1927 income, and, pursuant to said disallowance, the commissioner on October 31, 1931, assessed a tax for 1927 of $50,010.72 together with interest of $10,883.84, a total of $60,894.56. Thereafter, on July 13, 1933, the commissioner issued a certain certificate of overassessment bearing the number 1316757, a true copy of which is hereto attached as Exhibit J and by reference is made a part hereof. By said certificate $13,449.44 of the total amount assessed on October 31, 1931, as aforesaid was abated, leaving a balance on account of taxes and interest claimed as owing for 1927 as follows: income taxes, $38,965.14; interest thereon to October 31, 1931, $8,479.98; total, $47,445.12. The total amount so claimed as owing was collected and satisfied on or about July 13, 1933, by application thereto as credits of part of the 1922 overpayment, the 1923 overpayment, and part of the 1924 overpayment hereinbefore referred to, all as set out in paragraphs IX, X, and XI above.

j. On May 11, 1929, the company filed with the collector a consolidated return of income for 1928. Said return, after making allowance for the 1927 consolidated net loss of $226,235.29, disclosed a consolidated net loss for 1928 of $101,961.09. Disallowance of $790,455.20 of the deduction for 1926, all as set forth in subparagraph h above, wiped out the 1927 consolidated net loss, as set forth in subparagraph i above, and said 1928 consolidated net loss, and, pursuant to
15 said disallowance, the commissioner on October 31, 1931, made an assessment of taxes for 1928 in the amount of $42,166.52 and interest thereon of $6,646.71, which

amounts, together with a previous assessment, made April 26, 1930, of $7,758.58 in taxes and $518.34 in interest thereon (which last amounts had been paid to the collector prior to October 31, 1931, as hereinafter set out in paragraph XV), made a total of $57,090.15. Thereafter, on July 13, 1933, the commissioner issued a certain certificate of overassessment bearing the number 2223612, a true copy of which is hereto attached as Exhibit K and by reference is made a part hereof. By said certificate $34,543.10 of the total amount assessed for 1928 was abated, leaving a balance on account of taxes and interest claimed as owing for that year as follows: income taxes, $12,774.52; interest thereon to October 31, 1931, $1,495.61; total, $14,270.13. The total amount so claimed as owing was collected and satisfied on or about July 13, 1933, by application thereto as credits of part of the 1924 overpayment and part of the 1925 overpayment hereinbefore referred to, all as set out in paragraphs XI and XII above.

XV.

a. On April 23, 1930, pursuant to a demand of the collector, the company paid to him $7,758.58, together with interest thereon of $518.34, as tax claimed by the commissioner to be owing by the company for 1928. Said tax and interest were not owing if the company was entitled to deduct from 1926 income the $790,455.20 disallowed by the commissioner as hereinbefore stated.

b. On February 9, 1932, petitioners as receivers of the company filed a claim for refund of the $7,758.58 paid to the collector. A true copy of said claim is hereto attached as Exhibit L and by reference is made a part hereof. Said claim for refund was denied by the commissioner on July 13, 1933,

as shown by Exhibit B hereto attached.

16 XVI.

The interest credit of $24,034.76, described in paragraph IX, the interest credit of $1,235.69, described in paragraph X, the interest credit of $3,038.92, described in paragraph XI, and the interest credit of $2,501.09, described in paragraph XII, all of which credits were made against withholding taxes claimed by the commissioner to be owing by the company for 1921, were and are erroneous and unlawful by reason of the following facts:

a. During and since 1921 the company has owned all the capital stock of Ontario and Minnesota Power Company, Limited, an Ontario corporation, and the latter, together with plaintiff, has owned all the capital stock of Fort Frances Pulp

and Paper Company, Limited, hereinafter called Fort Frances.

b. During all such time Fort Frances has been engaged in the manufacture of newsprint at Fort Frances, Ontario, and for that purpose has used a plant leased from the Ontario and Minnesota Power Company, Limited. At no time has Fort Frances maintained any sales office or sales representative in the United States.

c. During 1921 Fort Frances marketed most of its product under a contract with the company. By the terms of that contract Fort Frances agreed to sell and the company agreed to buy, at specified prices with delivery f. o. b. Fort Frances, Ontario, newsprint produced by the former, and as orders were received from the company by Fort Frances, at Fort Frances, Ontario, the latter set aside the quantities required, prepared them for shipment, made delivery to the carrier at Fort Frances, and at the same time invoiced the company for all loadings. The company as purchaser then assumed all responsibility, paid all transportation charges, furnished all shipping instructions, and, so far as shipments into the United States were concerned, arranged for and signed all customs clearings papers as importer. There-
17 after the company resold the newsprint so purchased to its own customers for consumption, and in connection therewith made all financial and credit arrangements; no accounting was made by the company to Fort Frances in respect of such resales.

d. The books of both the company and Fort Frances have at all times mentioned been kept on the accrual basis, and returns of income have been made on that basis. Prior to 1926, however, neither the company nor Fort Frances entered on its books any accruals in respect of any interest on unpaid balances owing for newsprint purchased by the former from the latter as aforesaid. In that year changes were made in the accounting practices of both corporations and the company set up accrued interest on such balances for 1925 and 1926 on open accounts in favor of Fort Frances. In 1927 further accounting changes were made and changes were then set up on the company's books for interest accrued on such balances owing Fort Frances for 1921 and other years. The amount entered for 1921 was $164,525.98. Payment of the accruals entered as aforesaid was in no case made before entry of the item on the books.

e. During 1921 the company owned bonds of Ontario and Minnesota Power Company, Limited. The amount due the

company in 1921 in interest upon such bonds was in excess of the interest subsequently entered for that year against the company in favor of Fort Frances upon unpaid balances owing for newsprint purchased as aforesaid.

f. On or about March 15, 1922, the company filed with the collector for the year 1921 on a form designated Form 1042 its "Annual Return of Income Tax to be Paid at Source" and paid the withholding tax shown due thereon. In
18 said return no report was made or tax paid in respect of any interest owed Fort Frances upon unpaid balances for newsprint purchased in 1921 from Fort Frances as aforesaid.

g. Defendant took no steps and entered upon no proceedings to collect any withholding tax claimed to be owed by the company by reason of said interest item of $164,525.98 until on or about July 7, 1933, at which time the commissioner assessed against plaintiffs as receivers of the company a withholding tax thereon of $16,452.60 together with a penalty of $4,113.15, a total of $20,565.75. Thereafter, on or about July 13, 1933, said total amount so claimed as owing, together with interest thereon of $10,556.14 computed as follows:

On $4,113.15 from 3-15-22 to 7-10-33		$2,731.58
On 4,113.15 from 6-15-22 to 7-10-33		2,669.89
On 4,113.15 from 9-15-22 to 7-10-33		2,608.19
On 4,113.15 from 12-15-22 to 7-10-33		2,546.48
$16,452.60		$10,556.14

was, except as to $311.43 thereof, collected and satisfied by application thereto as credits of the 1922 interest item of $24,034.76, as set forth in paragraph IX above, of the 1923 interest item of $1,235.69, as set forth in paragraph X above, of the 1924 interest item of $3,038.92, as set forth in paragraph XI above, and of the 1925 interest item of $2,501.09, as set forth in paragraph XII above.

Wherefore plaintiffs pray the judgment of this Court that they are entitled to recover of the defendant One Hundred Eighteen Thousand Seven Hundred Twenty-seven and 61/100 Dollars ($118,727.61) with interest thereon according to law as follows:

19 On $15,909.39 of said amount from June 14, 1923,
On $16,704.70 of said amount from September 15, 1923,
On $16,704.68 of said amount from December 15, 1923,
On $29,427.69 of said amount from December 15, 1924,
On $6,172.50 of said amount from September 15, 1925,

On $17,731.73 of said amount from December 15, 1925,
On $1,948.56 of said amount from March 15, 1926,
On $5,851.44 of said amount from March 15, 1926,
On $7,758.58 of said amount from April 23, 1930,

together with their costs and disbursements, less, however, the amount of $22,241.52, representing overpayments in the amounts of $10,907.06, $5,483.02, and $5,851.44 for the years 1923, 1924, and 1925, respectively, applied as credits against withholding taxes owed by the company for 1930 and 1931, all as set forth in paragraphs X, XI, and XII above.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiffs, 1260 Northwestern Bank Building, Minneapolis, Minnesota.

COBB, HOKE, BENSON, KRAUSE & FAEGRE,

Of Counsel.

State of Minnesota,
County of Hennepin—ss.:

C. T. Jaffray, being first duly sworn, says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

C. T. JAFFRAY.

Subscribed and sworn to before me this 29th day of August, 1934.

E. M. MERRICK,
Notary Public, Hennepin County, Minn.

My Commission Expires Oct. 12, 1937.

(Notarial Seal)

---

20 Exhibit A.

Treasury Department
Washington.

Office of
Commissioner of Internal
Revenue

Aug. 31, 1933.

Address Reply to
Commissioner of Internal
Revenue and refer to
IT:C:CC-4
CCP

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

In re: Refund Claims for years: 1922, 1923, 1924.
Amounts: $66,818.77, $110,241.81,
$86,355.86 (2) $36,904.69, $29,882.76 and
$49,670.56.

Sirs:

In accordance with the provisions of section 3226, Revised Statutes, as amended, and as further amended by section 1103 of the Revenue Act of 1932, you are hereby notified that your claims for refund of taxes were disallowed to the extent indicated in certificates of overassessment numbered 2011190, 2014278, 2030102, on a schedule dated July 13, 1933.

By direction of the Commissioner:

Respectfully,
CHAS. T. RUSSELL,
Deputy Commissioner.
By T. F. Langley,
Head of Division.

---

21 Exhibit B.

Treasury Department
Washington.

Office of
Commissioner of
Internal Revenue

Aug. 31, 1933.

Address Reply to
Commissioner of Internal
Revenue and refer to
IT:C:CC-4
CCP

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

In re: Refund Claims for years: 1925, 1928.
Amounts: $8,815.30, $6,401.49,
$3,400.75 and $7,758.58.

Sirs:

In accordance with the provisions of section 3226, Revised Statutes, as amended, and as further amended by section 1103

of the Revenue Act of 1932, you are hereby notified that your claims for refund of taxes were disallowed to the extent indicated in certificates of overassessment numbered 2029738 2223612, on a schedule dated July 13, 1933.

By direction of the Commissioner:

Respectfully,
CHAS. T. RUSSELL,
Deputy Commissioner.
By T. F. Langley,
Head of Division.

---

22 Exhibit C.

Treasury Department

Office of
Commissioner of Internal Revenue
Washington

Income Tax Unit
IT:C:CC

Certificate Of
Overassessment
Number: 2011190
Allowed: $49,318.77
Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1922 indicates that the tax assessed for that year was in excess of the amount due:

Income tax assessed:

Original, June 1923, #400074	$66,818.77
Correct income tax liability	None
Overassessment	$66,818.77
Barred by statute of limitations	17,500.00
Overassessment allowable	$49,318.77

(See page 2 attached)

Page Tightly Bound

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

Abated: $
Credited: $42,884.00
To Tax. Year Addtl. 1926

Credited: $ 6,434.77
To Tax. Year Addtl. 1927

Tent. Int.
Credited: $24,034.76
To Tax. Year Addtl. 1921

Refunded: $
Interest: $

23 The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

In the determination of this overassessment the grounds set forth in your claim for refund of $66,818.77 have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

---

24 Exhibit D.

Treasury Department
Office of
Commissioner of Internal Revenue
Washington

Income Tax Unit
IT:C:CC

Certificate Of
Overassessment
Number: 2014278
Allowed: $29,427.69
Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1923 indicates that the tax assessed for that year was in excess of the amount due:

Income tax assessed:	
Orginal, June 1924, #400056	$166,352.88
Correct income tax liability	136,925.19
Overassessment	$ 29,427.69

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

In the determination of this overassessment the grounds set forth in your claim for refund of $110,241.81, and your two claims for refund of $86,355.86, each, have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

income tax return for the year in which received.

Page Tightly Bound

Abated: $
Credited: $29,427.69
To Tax. Year Addtl. 1927

Tent. Int.
Credited: $ 1,235.69
To Tax. Year Addtl. 1921

Tent. Int.
Credited: $10,907.06
To Tax. Year 1922

Refunded: $
Interest: $

Exhibit E.

Treasury Department

Office of
Commissioner of Internal Revenue
Washington

Income Tax Unit
IT:C:CC

Certificate Of
Overassessment
Number: 2030102
Allowed: $80,450.55
Schedule No. 50519

Mr. C. T. Jaffray and Mr. R. H. M. Robinson,
Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1924 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account, June, #400150	$ 70,926.94	
Additional, June 6, 1931, list #1, page 2, line o	41,851.55	$14,694.77
Total assessed	$112,778.49	$14,694.77
Correct income tax liability	47,022.71	None
Overassessment	$ 65,755.78	$14,694.77

In the determination of this overassessment the grounds set forth in your claims for refund of $36,904.69, $29,882.76, and $49,670.56 have been given careful consideration and to

Note—The interest, if any, included herein is taxable income, and must be included in your income tax return for the year in which received.

the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

(See page 2 attached)

The amount of the overassessment will be abated, credited or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

Abated: $56,546.32
Credited: $11,582.66
To Tax. Year Addtl. 1927.

Credited: $12,321.57
To Tax. Year Addtl. 1928

Tent. Int.
Credited: $8,521.94
To Tax. Year Addtl. 1922

Refunded: $
Interest: $

26 This overassessment is in accordance with the decision of the United States Board of Tax Appeals dated June 22, 1933, docket #52110.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

27

Exhibit F.

Treasury Department

Office of
Commissioner of Internal Revenue
Washington

Income Tax Unit
IT:C:CC

Certificate Of
Overassessment
Number: 2029738
Allowed: $12,193.99
Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1925 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original, June 1926, #400,220	$ 9,365.77	
Additional, June 6, 1931, list #1, page 2, line 1	3,344.96	$ 1,049.03
Total assessed	12,710.73	1,049.03
Correct income tax liability	1,565.77	None
Overassessment	$11,144.96	$ 1,049.03

(See page 2, attached)

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

Note—The interest, if any, included herein is taxable income, and must be included in your income tax return for the year in which received.

Abated: $4,393.99
Credited: $5,851.44
To Tax. Year Addtl. 1921

Credited: $1,948.56
To Tax. Year Addtl. 1928

Refunded: $
Interest: $

Tent. Int.
Credited: $2,831.25
To Tax. Year Addtl. 1922

Addtl. Int.
Credited: $ 396.06
To Tax. Year Addtl. 1922

28 The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

In the determination of this overassessment the grounds set forth in your claims for refund of $8,815.30, $6,401.49, and $3,400.75, have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

This overassessment is in accordance with the decision of the United States Board of Tax Appeals dated June 22, 1933, Docket #51134.

---

29 Exhibit G

Treasury Department
Internal Revenue Service
Form 866-CR
GC:R:ECH-C1-6413

Agreement as to Final Determination of Tax Liability

This Agreement, made in duplicate under and in pursuance of Section 606 of the Revenue Act of 1928, by and between

Name and Address	State of Incorporation	Period
Minnesota & Ontario Paper Company 1100 Builders Exchange, Minneapolis, Minnesota	Maine	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Falls Lumber & Coal Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
International Insulation Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927, 1928

International Lumber Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years, 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Minnesota, Dakota & Western Railway Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Minnesota Forest Products Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Rainy River Improvement Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927, and 1928
Watrous Island Boom Company 1100 Builders Exchange Minneapolis, Minnesota		Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928

taxpayers affiliated under Section 240 of the Revenue Acts of 1921, 1924 and 1926 and Section 142 of the Revenue Act of 1928, having their principal places of business at the address shown above and the Commissioner of Internal Revenue:

30 Whereas, there has been a determination of the tax liability of said taxpayers in respect of income tax imposed by the Revenue Acts of 1921, 1924, 1926 and 1928, for each taxable period stated above falling under the provisions of those acts in the sum of

$ 17,500.00 for the calendar year 1922,
$136,925.19 for the calendar year 1923,
$ 47,022.71 for the calendar year 1924,
$ 1,565.77 for the calendar year 1925,
$ 33,565.47 for the calendar year 1926,
$ 38,965.14 for the calendar year 1927, and
$ 20,533.10 for the calendar year 1928.

exclusive of any penalty or interest applicable thereto as provided by law:

Now, This Agreement Witnesseth, that said taxpayers and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if this agreement is approved

by the Secretary of the Treasury, or the Under Secretary, within one year from the date this agreement is signed by said taxpayers.

Reserving, however, to the taxpayers the right to contest the disallowance of the deduction claimed for the year 1926 in the amount of $790,455.20, which amount was paid, on March 22, 1926, to the United States Government in connection with the payment of additional Federal income, war-profits and excess-profits taxes for the calendar years 1917 to 1920, inclusive, and which amount the taxpayers contend was deductible as interest on deficiencies in taxes, and/or was deductible as a penalty, which contentions the Government denies, and reserving to the taxpayers the right to any benefit from the reduction in Federal income taxes, for the years 1926, 1927 and 1928, that will result in the event of a final conclusion of the issues favorable to the taxpayers.

Reserving also to the taxpayers expressly any and all rights which might hereafter accrue to them under Section 1107 of the Revenue Act of 1932 or any similar provision hereafter enacted, and it is stipulated that the execution hereof shall not preclude the taxpayers from recovering any refunds specified thereunder,—said Section 1107 relating to payments under Section 15 a of Interstate Commerce Act.

Provided also that nothing in this agreement shall be determinative of the liability of the Minnesota & Ontario Paper Company for the taxes provided in Section 237 of the Revenue Acts of 1921, 1924, and 1926 on account of interest paid by that company to the Fort Frances Pulp and Paper Company, Limited, A Canadian Corporation, Fort Frances, Ontario.

31 In Witness Whereof, the Commissioner and the undersigned corporations have subscribed their names to these presents in duplicate.

Signed this 12 day of June, 1933.

(Seal)

MINNESOTA & ONTARIO PAPER COMPANY,

Parent.

By C. T. Jaffray,
By R. H. M. Robinson,

By .....,

Receivers.

Signed this 12 day of June, 1933.

(Seal)

FALLS LUMBER & COAL COMPANY,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By C. S. Pope, Secretary.

(Signature and Title.)

Signed this 12 day of June, 1933.

(Seal)

THE INSULITE COMPANY, formerly the International Insulation Company,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By C. S. Pope, Secretary.

(Signature and Title.)

Signed this 12 day of June, 1933.

(Seal)

INTERNATIONAL LUMBER COMPANY,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By C. S. Pope, Secretary.

(Signature and Title.)

Signed this 12 day of June, 1933.

(Seal)

MINNESOTA, DAKOTA & WESTERN RAILWAY COMPANY,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By A. A. Figen, Secretary.

(Signature and Title.)

Signed this 12 day of June, 1933.

(Seal)

MINNESOTA FOREST PRODUCTS COMPANY,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By C. S. Pope, Secretary.

(Signature and Title.)

Signed this 12 day of June, 1933.

(Seal)

RAINY RIVER IMPROVEMENT COMPANY,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By C. S. Pope, Secretary.

(Signature and Title.)

Signed this 12 day of June, 1933.

(Seal)

WATROUS ISLAND BOOM COMPANY,

(Subsidiary.)

By R. H. M. Robinson, Vice-Pres.

(Signature and Title.)

By C. S. Pope, Secretary.

(Signature and Title.)

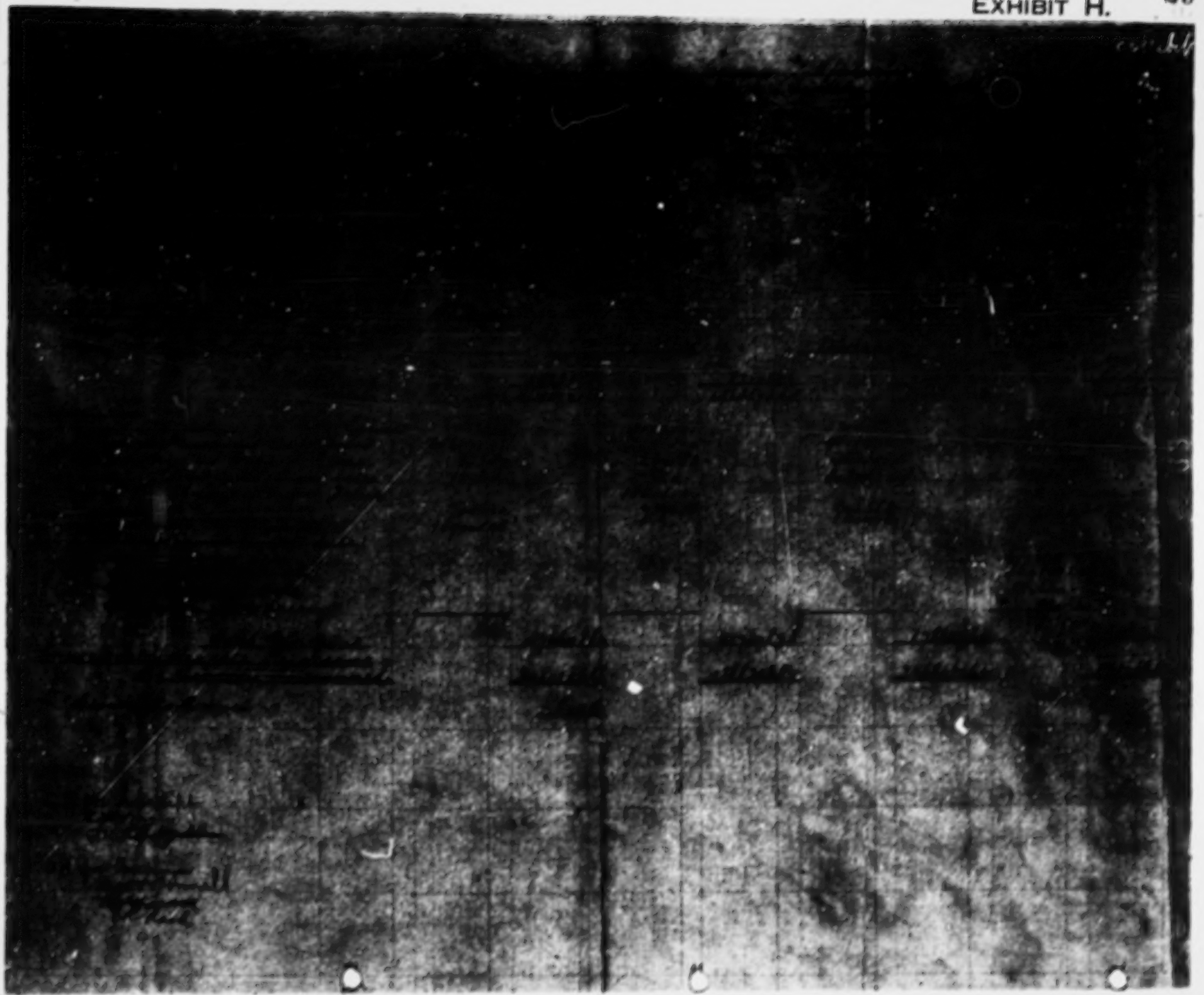
Signed this 7 day of July, 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue.

The above agreement has been approved by the Secretary of the Treasury, or the Under Secretary, in accordance with the provisions of Section 606 of the Revenue Act of 1928, the approval being specifically enumerated on—

Schedule No. 6829.

Dated July 7, 1933.

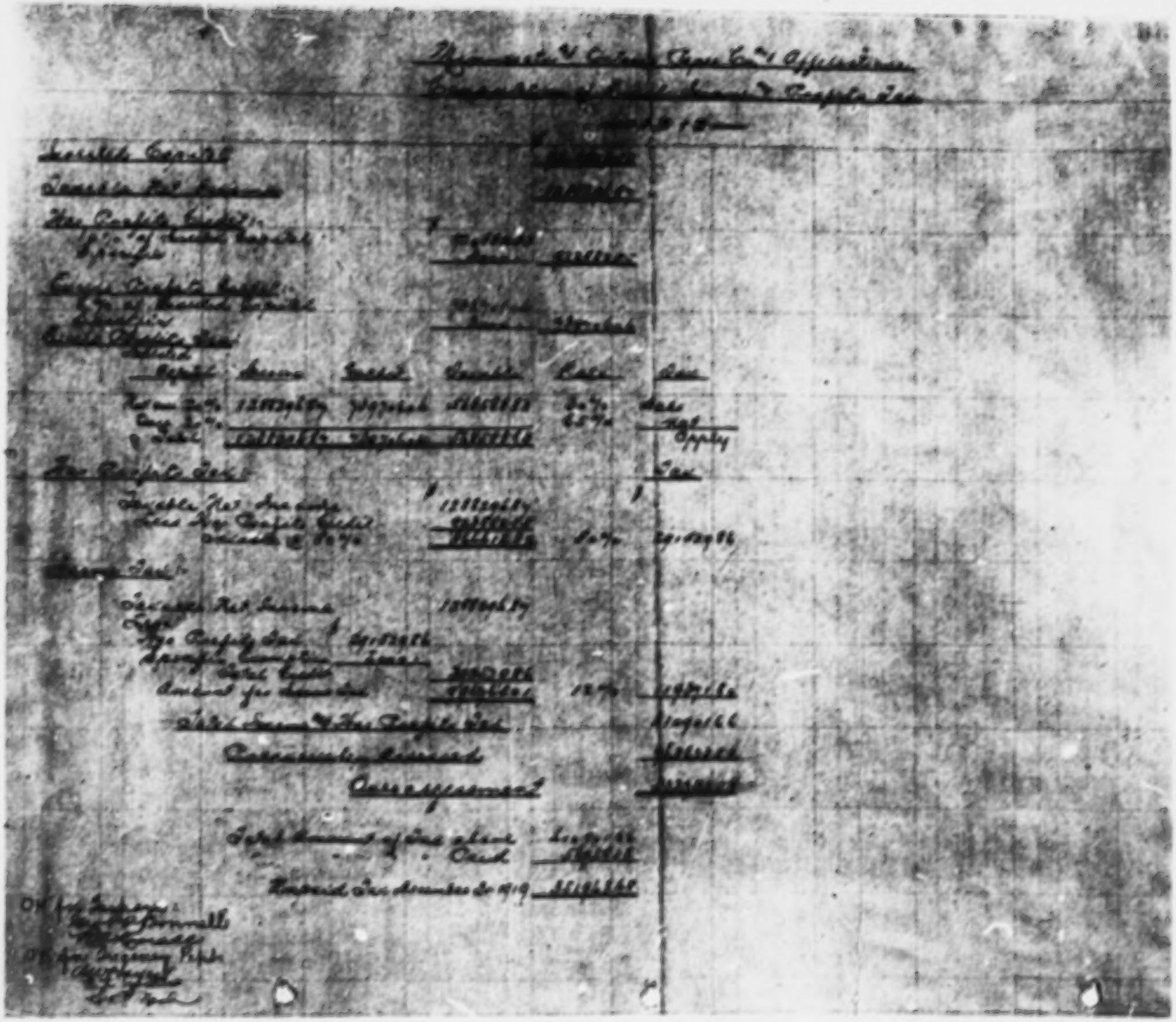


[redacted]

Manner of Conducting Capital & Affiliations

Comparisons of Earnings & Capitalization

— 1917 —



Statements of Crown Paper Company Affiliations
Comparative Income & Profit Loss Statements

— 1919 —

— 1920 —

Minnesota & Ontario Paper Co.

Statement of Shipments

Account of Shipments	1917 Rainy Lake	1916 Sturgeon			
Data from which Statement made: Account of Shipments					
from 16-1916 to Mond receipts 7 cars from	65	23			
Mond 15-1916	do.	7 cars			
June 15-1917	do.	6 cars 8 cars			
July 15-1917	do.	6 cars 6 cars			
Aug 15-1917	do.	6 cars 8 cars			
Mond 15-1916	do.	6 cars		1228.48	44288.45
June 15-1916	do.	8 cars 8 cars		1228.49	42349.84
July 15-1916	do.	8 cars 6 cars		1228.43	40852.24
Aug 15-1916	do.	8 cars 8 cars		1228.47	38492.22
Mond 15-1916	do.	8 cars			
June 15-1916	do.	8 cars 8 cars			
July 15-1916	do.	8 cars 6 cars			
Aug 15-1916	do.	8 cars 8 cars			
Total Shipments	1166.98	2561.11	1301.35	1166.98	

OK for the Bookkeeper
Chief Cruiser

OK for Survey Dept.
Chief Cruiser

38

-7-

Manufacturers' Excise Tax

Cash collections

Year			
1917	[illegible]	[illegible]	[illegible]
1918	[illegible]	[illegible]	[illegible]
1919	[illegible]	[illegible]	[illegible]
1920	[illegible]	[illegible]	[illegible]
Total	[illegible]	[illegible]	[illegible]

OK for the Secretary:
[illegible]

OK for Treasury Dept.
[illegible]

Minnesota & Ontario Paper Co. & Affiliated

Summary of Power Accounts Pages 4 to 6 inc.

41

Exhibit I.

Treasury Department

Office of
Commissioner Of Internal Revenue
Washington.

Income Tax Unit
IT:C:CC

Certificate of
Overassessment
Number: 1316756
Allowed: $10,222.00
Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1926 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account #857857	None	None
Additional, October 31, 1931, list #5, page 1, line 0	$ 41,566.02	$ 11,539.98
Total assessed	$ 41,566.02	$ 11,539.98
Correct tax liability	33,565.47	9,318.53
Overassessment	$ 8,000.55	$ 2,221.45

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made ac-

tax return for the year in which received.

Page Tightly Bound

cordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

Abated: $10,222.00
Credited: $
To Tax. Year
Credited: $
To Tax. Year
Refunded: $
Interest: $

42

Exhibit J.

Treasury Department

Office of
Commissioner Of Internal Revenue
Washington.

Income Tax Unit
IT:C:CC

Certificate of
Overassessment
Number: 1316757
Allowed: $13,449.44
Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1927 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account, #858039	None	None
Additional, October 31, 1931, list #5, page 1, line 1	$ 50,010.72	$ 10,883.84
Total assessed	50,010.72	10,883.84
Correct tax liability	38,965.14	8,479.98
Overassessment	$ 11,045.58	$ 2,403.86

Note—The interest, if any, included herein is taxable income, and must be included in your income tax return for the year in which received.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

Abated: $13,449.44
Credited: $
To Tax. Year

Credited: $
To Tax. Year

Refunded: $
Interest: $

43

Exhibit K.

Treasury Department

Office of
Commissioner Of Internal Revenue
Washington.

Income Tax Unit
IT:C:CC

Certificate of
Overassessment
Number: 2223612
Allowed: $34,543.10
Schedule No. 50519

Mr. C. T. Jaffray and Mr. R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1928 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account #857787	None	None
Additional, April 26, 1930, account A-520105, 1930	$ 7,758.58	$ 518.34
Additional, October 31, 1931, list # 5, page 1, line 2	42,166.52	6,646.71
Total Assessed	49,925.10	7,165.05
Correct tax liability	20,533.10	2,013.95
Overassessment	$ 29,392.00	$ 5,151.10

In the determination of this overassessment the grounds set forth in your claim for refund of $7,758.58 have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

(See page 2 attached.)

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

H. B. ROBINSON,
Head of Division.

Abated: $34,543.10
Credited: $
To Tax. Year
Credited: $
To Tax. Year
Refunded: $
Interest: $

Note—The interest, if any, included herein is taxable income, and must be included in your income tax return for the year in which received.

44 The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 322 of the Revenue Act of 1928.

---

45 Exhibit L.

Form 843
Treasury Department
Internal Revenue Service
Revised June, 1930

Claim.

To be Filed with the Collector where Assessment was made or Tax Paid.

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐Refund of Tax Illegally Collected.

☐Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Minnesota,
County of Hennepin—ss:

Name of taxpayer or purchaser of stamps: C. T. JAFFRAY AND R. H. M. ROBINSON Receivers For Minnesota and Ontario Paper Company

Business address: 1100 Builders Exchange Building, (Street) Minneapolis, Minnesota. (City) (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed St. Paul, Minnesota.

2. Period (if for income tax, make separate form for each taxable year) from June 1, 1928, to December 31, 1928.

3. Character of assessment or tax Corporation Income Taxes.

4. Amount of assessment, $7,758.58; dates of payment April 23, 1930.

5. Date stamps were purchased from the Government .....

6. Amount to be refunded $7,758.58.

7. Amount to be abated (not applicable to income or estate taxes) $.....

8. The time within which this claim may be legally filed expires, under Section 322 (h) of the Revenue Act of 1928, on April 23, 1932.

46 The deponent verily believes that this claim should be allowed for the following reasons:

Reference is herewith made to a "Statement of Objections" dated January 27, 1932, filed by C. T. Jaffray and R. H. M. Robinson, Receivers For Minnesota and Ontario Paper Company, against the additional assessment of corporation income taxes for years, 1926, 1927, and 1928, and on basis of said statement, the taxpayer is entitled to a refund for the year 1928 amounting to $7,758.58 plus interest thereon as provided by law.

All of the facts recited in said statement are incorporated herein by reference with the same force and effect as if fully rewritten herein.

Signed C. T. JAFFRAY AND R. H. M. ROBINSON,
Receivers For Minnesota and Ontario Paper Company.
By C. T. Jaffray,
and By R. H. M. Robinson.

Sworn to and subscribed before me this 8th day of February, 1932.

E. M. MERRICK,
Notary Public, Hennepin County, Minn.

My commission expires Oct. 12, 1937.

(Endorsed): Filed August 29, 1934, Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

47 (Affidavit of Service of Petition on United States Attorney.)

State of Minnesota,
County of Hennepin—ss.:

Frank Janes, being duly sworn, says that on the 30th day of August, 1934, in the City of St. Paul in the State and District of Minnesota, he served a copy of the petition in the above entitled matter, which petition was filed with the Clerk of the above named court on August 29, 1934, upon Hon. George F. Sullivan, United States Attorney in and for said District, personally by delivering and handing to said George F. Sullivan, as such United States Attorney, a true and correct copy of said petition.

FRANK JANES.

Subscribed and sworn to before me this 31st day of August, 1934.

(Seal) FRANK S. KEENAN,
Notary Public, Hennepin County, Minn.

My Commission Expires Mar. 21, 1937.

---

48 (Affidavit of Service of Petition on Attorney General of the United States.)

State of Minnesota,
County of Hennepin.—ss.:

Juliana Halvorson, being first duly sworn, says that on August 31st, 1934, in the City of Minneapolis, Hennepin County, Minnesota, she caused a copy of the petition in the above entitled matter, which said petition was filed with the Clerk of the above Court, on August 29, 1934, to be mailed to and served upon the Attorney General of the United States by depositing a true and correct copy of said petition properly enveloped and sealed with postage prepaid and registered and addressed to The Attorney General of the United States at Washington, District of Columbia, in the post office at Minneapolis, Minnesota, where affiant and Messrs. J. B. Faegre and Hayner N. Larson, attorneys for the plaintiffs reside; that there is a regular communication by mail between the places of residence of the attorneys for the plaintiffs and Washington, District of Columbia.

JULIANA HALVORSON.

Subscribed and sworn to before me this 31st day of August, 1934.

FRANK S. KEENAN,
Notary Public,
Hennepin County, Minn.

(Seal)
My Commission Expires Mar. 21, 1937.

(Endorsed): Filed Sept. 1, 1934. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

49 (Demurrer of Defendant to Complaint and Marshal's Return of Service.)

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray and R. H. M. Robinson, As Trustees of the Estate of Minnesota and Ontario Paper Company, A Corporation, Debtor, Plaintiffs,
No. 3391. vs. Law.
United States of America, Defendant.

Comes now the defendant and demurs to the complaint of the plaintiff herein on the following grounds:

I.

That the Court has not jurisdiction of the subject of the action.

II.

That the facts stated therein do not constitute a cause of action.

Dated: January 22, 1935.

GEORGE F. SULLIVAN,
United States Attorney,
221 Federal Courts Building,
Saint Paul, Minnesota.

To the Clerk of the United States District Court:

Please place the above demurrer on for hearing at the special term of the Court in the Fourth Division to be held in Minneapolis on February 11, 1935.

GEORGE F. SULLIVAN,
United States Attorney.

---

50 Return on Service of Writ.

United States of America,
District of Minnesota—ss.:

I hereby certify and return that I served the annexed Demurrer on the therein-named Hayner N. Larson, attorney, by handing to and leaving a true and correct copy thereof with him personally at Minneapolis in said District on the 23rd day of January, A. D. 1935.

BERNARD ANDERSON,
U. S. Marshal.
By T. J. Beatty, Deputy.

(Endorsed) Service admitted this 23rd of January, 1935.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plf.

Filed January 26, 1935.

MARGARET L. MULLANE,
Clerk,
By Thomas H. Howard,
Chief Deputy.

---

51 (Order Granting Leave to Amend Petition.)

It appearing that there is no objection to the granting thereof,

It Is Hereby Ordered that the within motion be granted and that the petition be and the same hereby is amended as in said motion prayed.

By the Court

GUNNAR H. NORDBYE,
Judge.

Dated this 14 day of February, 1935.

---

52 (Motion of Plaintiffs for Leave to Amend Petition.)

United States District Court, District of Minnesota,
Fourth Division.

C. T. Jaffray and R. H. M. Robinson, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. Law.
United States of America, Defendant.

Come now the plaintiffs and move the Court for an order amending the petition of the plaintiffs in the following respects:

(a) That the title of the above proceeding be amended so as to read as follows:

"C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,

vs.

United States of America, Defendant."

(b) That paragraph II of the petition be amended by inserting after the word "plaintiffs", being the first word in said paragraph, the names and word "Jaffray and Robinson".

(c) That paragraph II of the petition be amended by inserting after the first sentence thereof the following sentence: "Plaintiff Archer now is and at all times since September 29, 1934, has been, pursuant to an order of this Court that date made and entered under said Act, a duly appointed, qualified, and acting trustee of the estate of the company."

53 (d) That the first sentence of the second subparagraph of paragraph II of the petition be amended so as to read as follows: "Plaintiffs Jaffray and Archer are residents of Minneapolis, Minnesota, and St. Paul, Minnesota, respectively."

(e) That the third subparagraph of paragraph II of the petition be amended by inserting after the word "plaintiffs" the names and word "Jaffray and Robinson".

(f) That the first sentence of paragraph VIII of the petition be amended by inserting after the word "plaintiffs" the names and word "Jaffray and Robinson".

(g) That subparagraph (a) of paragraph XVI of the petition be amended by deleting the word "plaintiffs" and inserting in lieu thereof the words "the company".

(h) That the first clause of subparagraph (f) of paragraph XVI be amended so as to read "on or about March 1, 1922".

(i) That the prayer for relief of the petition be amended by striking therefrom the symbol and numbers "$7,758.58" and inserting in lieu thereof the following, "$8,276.92".

Dated this 13th day of February, 1935.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiffs,
1260 Northwestern Bank Building,
Minneapolis, Minnesota.

Cobb, Hoke, Benson, Krause & Faegre,
Of Counsel.

Defendant interposes no objections to the Court's making and entering an order granting the above motion.

GEORGE F. SULLIVAN,
United States Attorney.

LINUS J. HAMMOND,
Assistant United States Attorney.

(Endorsed): Filed February 14, 1935. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

54 (Order Sustaining Demurrer of Defendant to Complaint; Plaintiffs Granted Leave to File Amended Complaint, July 1, 1935.)

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray and R. H. M. Robinson, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. Law.
United States of America, Defendant.

The above matter came before this Court on a demurrer by the defendant to the complaint of the plaintiff on the grounds that (1) the Court has not jurisdiction of the subject of the action, and (2) that the facts stated therein are not sufficient to constitute a cause of action.

Mr. George F. Sullivan, United States Attorney, and Mr. Joseph E. Garvey, Attorney of the Department of Justice, appeared in behalf of the defendant in support of said demurrer; and

Mr. J. B. Faegre and Mr. Hayner N. Larson appeared as attorneys for the plaintiffs in opposition thereto.

55 It appears from the complaint that this is a proceeding for the recovery of internal revenue taxes erroneously and illegally assessed and collected. The proceeding against the United States is predicated on the fact that Willcuts, the Collector to whom the tax was paid, is not now in office, and that this is an action which could have been maintained against the Collector personally. In that the plaintiffs seek to recover more than $10,000, it is evident that unless this action could have been asserted against the Collector if he had been in office, this Court has no jurisdiction and the plaintiffs must be relegated to the Court of Claims for their relief.

Moses vs. United States, 61 Fed. (2d) 791 (C. C. A. 2) certiorari denied 289 U. S. 743.

The Minnesota and Ontaria Paper Company filed with the Collector of Internal Revenue claims for refunds of taxes paid for the years 1922 to 1925, inclusive. Later, the Commissioner of Internal Revenue issued certificates of over-assessment in which the overpayment of the 1922-25 taxes was recognized, and in the same certificate he directed attention to the application of the overassessment to a deficiency which the Commissioner contended was due the United States from the taxpayer for the years 1921, 1926, 1927 and 1928. The alleged deficiency arose by reason of a prior deduction taken by the taxpayer of some $790,000, which in a prior year the taxpayer was required to pay to the Government; the taxpayer contending that the payment was deductible as interest paid to the Government, while the Government denied
56 this right of deduction because it construed the $790,000 payment as a penalty rather than interest, and hence not deductible. The Government's determination of the character of the $790,000 payment made a gain for the years 1926 to 1928, instead of a loss as computed by the taxpayer, and in this manner the alleged deficiency arose, which was satisfied by the overassessment found by the Commissioner to exist for the years 1922 to 1925, inclusive. Another item of $7,758.58 entered into the situation. This sum was paid in the 1928 tax, and was apparently recognized as an item that should be returned to the taxpayer, and this sum, added to the overassessment found to exist for the years 1922 to 1925, inclusive, exactly equalled the deficiency as computed by the Commissioner. Notification of the Commissioner's action is evidenced by the letters, Exhibits "A" and "B", attached to the complaint dated August 31, 1933. This suit was commenced in 1934. Admittedly, if the alleged deficiency was due the Government, it was the duty of the Commissioner to apply the overpayment upon such deficiency.

The Court gathers that it sufficiently appears that the claim for refund for the years 1922 to 1925, inclusive, was duly filed by the taxpayer, and that if this Court has jurisdiction, the action was filed within the statutory period. It should be noted that plaintiffs' action is bottomed on the theory that the Commissioner, in applying the overpayment to the alleged deficiency, in effect rejected the application for the refund that was filed with the Collector of Inter-
57 nal Revenue, and that such action on the part of the Commissioner, according to the plaintiffs, is tantamount to a rejection so as to justify the bringing of an action in this Court for the recovery of this overpayment.

Section 3226 of the Revised Statutes as amended by Section 1103 (a) of the Revenue Act of 1932, c. 509, 47 Stat. 169, provides:

"No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

The sum that is now sued for is the same fund that the taxpayer requested the Collector to refund. It was paid to the Collector. The Government, through the Commissioner, refused a return to the taxpayer and applied the overpayment as hereinbefore stated. The taxpayer contends that the application was erroneous and unlawful.

This action to be sustained as against the Collector if he is in office, must be founded upon the erroneous collection by him of the 1922-25 taxes. It cannot be bottomed on
58 an account stated or implied contract as announced in Bonwit Teller & Co. vs. United States, 283 U. S. 258. Willcuts, the Collector to whom the tax was paid, had absolutely nothing to do with the issuance of the overassessment certificate. He was not a privy to that agreement, nor had he either expressly or impliedly admitted the overpayment of the taxes in question. The Collector's connection with the Commissioner's action was purely ministerial and administrative, and in that the taxpayer seeks to recover a sum in excess of $10,000, an account stated or implied contract as a basis of recovery can only be directed against the Government in the Court of Claims. This Court has no jurisdiction of such an action. The complaint would be demurrable by Willcuts, and hence is demurrable by the Government. First National Bank vs. United States, 2 F. Supp. 109; Untermeyer vs. Bowers, 7 F. Supp. 347; Moses vs. United States, supra;

Harvey Co. vs. Malley, 60 Fed. (2d) 97. In other words, it is evident that, as against the Collector, plaintiffs cannot rest their cause of action by simply proving the issuance and acceptance of the certificate of overassessment issued by the Commissioner. If the action is to be maintained against the Collector, plaintiffs will be required to allege and prove that the 1922-1925 taxes in the amount claimed were illegally collected. A reading of the bill of complaint indicates that plaintiffs have erroneously assumed that they could proceed against the Collector on the admission of the Commissioner.

59 There are no grounds alleged in the bill of complaint to substantiate any action as against the Collector. Mere statements or conclusions will not suffice. Moses vs. United States, supra; Untermeyer vs. United States, supra. In the latter case, Judge Patterson in considering a complaint that was legally comparable to the present one, stated:

"The plaintiffs' one chance to hold the collector liable would be on the theory of a wrongful collection by the latter when the plaintiff was obliged to make payment in June, 1924. If the payment then made was an overpayment of his 1919 tax liability to the extent of $29,497.30, a suit against the collector to recover this amount is appropriate. But the complaint does not set forth any such cause of action. It is not alleged either in generality or in detail that the 1924 payment was an overpayment. The complaint does not state that the plaintiffs' true income in 1919 was so much, that the proper tax thereon was so much, but that the collector compelled him to pay an excessive amount. The statement that the Commissioner conceded that there had been an overpayment of $29,497.30 will not do. That is merely the pleading of evidence, and the defendant may nevertheless insist that despite the Commissioner's concession there was actually no overpayment. As the pleadings now stand, there is no issue squarely raised as to whether the payment made in 1924 was an overpayment by the plaintiff."

There is no provision in the Revenue Act that suggests that the issuance by the Commissioner of a certificate of overassessment, coupled with an application of the overassessment to a deficiency, deprives the taxpayer of the right to proceed against the Collector who collected the overpayment. The taxpayer may presumably waive the rights that may accrue by reason of the issuance of a certificate of overassessment in absence of any adoption by the taxpayer which would result in an account settled. A commissioner may

60 issue a certificate of overassessment and make no refund nor attempt to apply the assessment on any de-

ficiency alleged to be due the Government. Under such circumstances, the Commissioner having filed his decision on the claim, and not having refunded the payment, the taxpayer could proceed against the Collector and establish by proof his right to recover the overpayment, or he could proceed in the Court of Claims on the account stated or implied promise to pay. It is urged by the defendant in support of its demurrer that the Commissioner allowed the claim by the issuance of the overassessment certificate, and hence this action would not lie because the Government has not rejected the claim for refund. It should be noted, however, that the Act does not state that as a condition precedent to the bringing of an action against the Collector, the Commissioner must have formally disallowed the claim. Before suit may be brought, it provides (26 USCA § 156):

"* * * No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision therein within that time."

If no decision was made by the Commissioner in the six months' period, then suit could be commenced at any time, and the statute of limitations would not commence until two years after the disallowance of the claim. Strictly speaking, therefore, the characterization of the act of the Commissioner in issuing the certificate of overassessment as an allowance or rejection of the claim is not controlling in this proceed-
61 ing against the Collector, in that it is not contended that the two year period has expired. It is interesting to note that in Moses vs. United States, supra, the Government was sustained in its contention that the issuance of a certificate of overassessment by the Commissioner and the application of the overassessment to an alleged deficiency was tantamount to a rejection in so far that it required an action brought against the Collector to be instituted within two years after the issuance of such certificate. The same conclusion was reached in Pratt & Whitney Co. vs. United States, (Ct. Cl.), 6 F. Supp. 574, the court stating (page 576):

"He (the Commissioner) found and determined that the taxes for 1918 had been overpaid, or, as stated in the language of the Bureau, there had been an 'overassessment' thereof. Having also determined a deficiency in the 1917 taxes, he applied part of the overpayment thereon and refunded the balance. All this was shown by the certificate of overassessment in the manner above stated. When the Commissioner computed the amount of refund to be made the plaintiff and paid it, he allowed the claim for refund to that

extent. When, instead of refunding the remainder of the overpayment to plaintiff, he credited it upon the taxes of other years, he rejected the claim for refund to the extent of these credits. * * * If, after the filing of this claim, the Commissioner had announced that he had considered the matter and determined that there was no overpayment, we do not think any one would claim that suit could not then be begun. In the case at bar, after consideration and having found that there was an overpayment, he announced that part of this overpayment would be credited on taxes for other years. This was in effect a disallowance of the part of the claim to which the suit relates and the provisions of section 3226 became applicable. * * * The Commissioner did not merely allow the overassessment; he determined it, and by the same determination announced that a part of it would not be refunded."

62 In the supplemental opinion of the Court of Claims in the above case, 353 C. C. H. par. 9222, it is stated:

"Plaintiff has filed a motion for new trial in which amendments to the findings are requested and the matter of the recovery of the portion of the overassessment for 1918 which was applied upon a deficiency for 1917 is reargued at great length. In the original opinion the court held that plaintiff's claim for refund of the taxes of 1918 was rejected and it is assumed in argument that the basis of this holding was the validity of the credit. This is an error. The question of whether the claim was rejected does not in any way depend upon the determination of whether the credit was valid and effective. The act of the Commissioner in making the credit, whether valid or invalid, was one of the matters that showed that the claim was rejected. The facts are that the Commissioner had mailed to plaintiff a full itemized statement of its liability for taxes for the years in controversy, as he determined it, in the form of a so-called 'certificate of overassessment' which showed a credit upon the taxes of 1917 of the principal sum for which plaintiff now brings suit and also showed the balance due plaintiff which was refunded and accepted. Regardless of how we construe the statute of 1928 which declares credits upon barred taxes to be 'void,' the plaintiff must have understood from the statement of the account and the acts of the Commissioner in relation thereto that the Commissioner refused to pay anything more upon its claim for refund than the amount specified as refundable in the statement of the account with interest thereon and that the remainder of plaintiff's claim for refund was rejected. When the Commissioner informed plaintiff that

the part of the overpayment for which suit is now being brought was credited upon taxes of another year, he could not have made any statement that would more definitely inform plaintiff that the claim for refund thereof had been rejected, and when it was rejected the statute of limitations began to run."

The Government further contends and earnestly suggests that even though the complaint herein could be amended so as to set forth a good cause of action as against the Collector on the theory of a tax illegally collected, nevertheless, the Court would not have jurisdiction because by the issuance of the certificate of assessment and the application upon
63 the deficiency alleged to exist in prior years, the taxpayer must proceed in the Court of Claims. It is urged that permitting the taxpayer to proceed against a Collector under the circumstances herein may permit the taxpayer in effect to recover the overpayment credit which has been applied to the alleged deficiency and which constituted a payment of such deficiency without complying with the requirement of filing a claim for refund for the overpayment caused by the application of such credit. That same situation would be true if the taxpayer proceeded in the Court of Claims on the account stated. The Government has determined that a deficiency exists, and presumably it has duly investigated the entire tax situation during such years and the entire matter can be litigated and determined in either the Court of Claims on an account stated or implied promise, or on an action against the Collector, treating the action of the Commissioner as a rejection. If the Government's contention is to be sustained, then, under the circumstances herein, the taxpayer would be required to file a claim for refund for the overpayment of taxes for the years 1921, 1926, 1927 and 1928 by reason of the credit, and await the action of the Commissioner before any suit was brought. Then, if the refund was denied for these years, the taxpayer would be required to proceed in the Court of Claims because the overpayment of the 1921, 1926, 1927 and 1928 taxes was caused by the act of the Commissioner in applying the credit, and the Collector was not a party to such procedure. The Court can find no provision or implication in the Act
64 which requires or recognizes such procedure, and which sanctions the view that a credit applied as herein creates a payment which, if in excess of the amount legally due for such years, requires a claim filed for refund as a condition precedent to the determination of the correct-

ness of the Commissioner's action. See Rosenstadt and Waller vs. United States, 7 F. Supp. 287; Parks and Woolson Machine Co. vs. United States, 58 Fed. (2d) 868. Assume, for instance, that no certificate of overassessment had been issued, but when the six months' period had expired, the taxpayer brought this action against the Collector for overpayment of the taxes. If the Government answered and admitted the overpayment, but averred that it had been applied on a tax deficiency accruing in prior years, would it be contended that the taxpayer would be required to drop the pending suit and file a claim for refund for the year's taxes to which the overpayment had been applied in the event he desired to contest the validity of such claimed deficiency? Under such circumstances, if defendant's position be sound, the Government could require the taxpayer to run around in a circle and the refund of taxes would be an endless procedure. In Moses vs. United States, supra, the Court recognized the propriety of maintaining an action against a Collector under circumstances comparable to the facts herein. There, as here, the complaint not only set forth the certificates of overassessment issued by the Commissioner, but alleged in some detail the illegality and error of the Commissioner's action in finding the existence of the deficiency in the prior years to which the overassessment was applied. The Court
65 treated such allegations as mere surplusage, and under a liberal construction of the complaint concluded that, if the plaintiff had sufficiently alleged a cause of action against the Collector by reason of erroneously collecting the tax which the Commissioner sought to apply to the alleged deficiency, then the complaint should be sustained. It would seem, therefore, that plaintiffs herein could proceed by alleging the filing of the claim for refund, pleading the facts showing that the revenue tax was erroneously collected by the Collector, that the Collector was now out of office, that more than six months had expired since the filing of the claim, and that no refund had been made to the taxpayer. Such an action would be sustainable under the Tucker Act. It may be that the more expeditious procedure would be for the taxpayer to proceed in the Court of Claims, and that there would be fewer complications if the taxpayer under the circumstances herein lodged its complaint in that tribunal, but the Court is not prepared to say that this Court is without jurisdiction. Whichever court is used, the action of the Commissioner in applying the overpayment to the alleged deficiency of the prior years will presumably be for determination, and, if valid, then there can be no recovery by the taxpayer.

Therefore, summarizing the Court's views herein, it may be stated that it is the Court's opinion that this Court has jurisdiction to proceed under the Tucker Act in an action brought by the taxpayer to recover for the alleged overpayment of the taxes for the years 1922 to 1925, but such
66 action, however, cannot be predicated on any certificate of overassessment issued by the Commissioner of Internal Revenue, but must be based upon facts which establish the illegality of the tax collected by the Collector. The instant complaint, however, is demurrable in that it is predicated and bottomed on an entirely wrong theory and states no cause of action against the Collector if he had been in office. The demurrer, therefore, must be sustained and the bill dismissed, but in view of the fact that the plaintiffs may desire to amend their complaint in harmony with the views expressed herein, the Court will allow twenty days after the filing of this order within which the plaintiffs may file their amended complaint.

It is so ordered.

Dated this 1st day of July, 1935.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed): Filed July 1st, 1935. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

67 (Petition of Plaintiffs for Rehearing of Order sustaining Demurrer to Complaint.)

Come now plaintiffs and respectfully pray the Court for an order granting a rehearing upon the demurrer interposed by defendant to plaintiffs' complaint, which demurrer was sustained by order of the Court dated and filed July 1, 1935.

In support of this petition for rehearing, plaintiffs respectfully represent to the Court the following facts:

This proceeding is brought for the recovery of internal revenue taxes for the years 1922 to 1925, inclusive, and for the year 1928, alleged to have been illegally collected by one Levi M. Willcuts as Collector of Internal Revenue for the District of Minnesota; since the amount of the recovery sought is in excess of $10,000, the complaint alleges (paragraph I) that Willcuts was not in office when the suit was begun.

It is alleged in the complaint that the following amounts of taxes were paid for each of the years 1922 to 1925, inclusive:

Year	Amount	Allegation
1922	$ 66,818.77	Paragraph IV
1923	166,352.88	Paragraph V
1924	70,926.94	Paragraph VI
1925	9,365.77	Paragraph VII

68 It is alleged further that the following claims for refund were filed for each of said years:

Year	Amount Claimed	Allegation
1922	$66,818.77	Paragraph IV
1923	86,355.86	Paragraph V
1924	49,670.56	Paragraph VI
1925	3,400.75	Paragraph VII

The complaint further alleges (paragraphs VIII, IX, X, XI, and XII) that subsequent to the filing of the claims for refund the Commissioner of Internal Revenue issued a certificate of overassessment for each of the years 1922 to 1925, inclusive, showing the following overpayments of taxes:

Year	Amount Overpaid	Allegation
1922	$49,318.77	Paragraph IX
1923	29,427.69	Paragraph X
1924	23,904.23	Paragraph XI
1925	7,800.00	Paragraph XII

The certificates of overassessment stated that the overpayments indicated therein together with interest on the amounts of said overpayments would be credited against deficiencies for taxes claimed for other years, including deficiencies claimed for the years 1921, 1926, 1927, and 1928. The paragraphs of the complaint referred to allege also that, except as noted in said paragraphs, credits were in fact made on or about July 13, 1933, as indicated in said certificates of overassessment.

The complaint, in paragraph XIII, also refers to a settlement agreement entered into by the taxpaying companies and the Commissioner of Internal Revenue; the agreement is attached to the complaint as Exhibit G, was signed by the Commissioner of Internal Revenue July 7, 1933, and was approved by the Secretary of the Treasury on the same date. This agreement, as recited in the beginning thereof, was made

under and in pursuance of Section 606 of the Revenue
69 Act of 1928, determined the amount of tax legally owing for each of the years 1922 to 1925, inclusive, among others, and provided that the parties mutually agreed that the principal amount of the liability so determined should be final and conclusive upon approval of the agreement by the Secretary of the Treasury. As respects the years 1922 to 1925, inclusive, the amounts sought to be recovered in this suit do not exceed the difference between the amounts shown by said agreement as owing for said years and the amounts alleged as having been paid for said years.

The complaint also alleges facts whereon is based plaintiffs' contention that the credits made by the Commissioner of Internal Revenue were illegal as applied to the deficiencies claimed for the years 1921, 1926, 1927, and 1928. It alleges further (paragraph XV) that a claim for refund in the amount of $7,758.58 was filed for the year 1928. The claim for refund is attached to the complaint as Exhibit L.

In its order sustaining defendant's demurrer, the Court concluded that the complaint failed to state a cause of action for recovery of taxes for the years 1922 to 1925, inclusive, for the reason that no facts are alleged showing wherein such taxes were illegal. The order states:

*** it is evident that, as against the Collector, plaintiffs cannot rest their cause of action by simply proving the issuance and acceptance of the certificate of overassessment issued by the Commissioner. If the action is to be maintained against the Collector, plaintiffs will be required to allege and prove that the 1922-1925 taxes in the amount claimed were illegally collected. A reading of the bill of complaint indicates that plaintiffs have erroneously assumed that they could proceed against the Collector on the admission of the Commissioner. There are no grounds alleged in the bill of complaint to substantiate any action as against the Collector. Mere statements or conclusions will not suffice. ***

The order further states (p. 13) that plaintiffs' action

*** cannot be predicated on any certificate of overassessment issued by the Commissioner of Internal Revenue, but must be based upon facts which establish the illegality of the tax collected by the Collector. ***

70 In its order sustaining the demurrer, the Court makes no reference to the settlement agreement, Exhibit "G", approved by the Secretary of the Treasury on July 7, 1933. This is undoubtedly due to the inadvertent failure of counsel

for plaintiffs to draw the court's attention to the existence of the agreement and to the provisions of Section 606 of the Revenue Act of 1928 authorizing its execution. Section 606 provides as follows:

(a) The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner), is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

It is evident, we respectfully submit, that by the terms of Section 606 the determination of the amount of taxes legally owing made by the agreement of July 7, 1933, in the absence of fraud or the misstatement of a material fact, is binding and conclusive upon the taxpayer and the Government, including all officers or agents of the Government, of whom the Collector is one, that by the execution of the agreement of July 7, 1933, the fact of overpayment of taxes for 1922 to 1925 is conclusively established, and that neither the plaintiffs nor the defendant (nor the Collector, were he the defendant in the action) is by law permitted to controvert that fact.

71 It follows that the illegality of the collection of the taxes for 1922 to 1925, inclusive, sought to be recovered is sufficiently alleged and that a setting out in the complaint of the facts resulting in such illegality would probably be subject to be stricken as surplusage. See Aetna Life Ins. Co. vs. Eaton (C.C.A. 2d), 43 F. (2d) 711, certiorari denied, 282 U. S. 887; Hering vs. Tait (C. C. A. 4th), 65 F. (2d) 703.

Respectfully submitted,

J. B. FAEGRE,
HAYNER N. LARSON.

State of Minnesota,
County of Hennepin—ss.:

Hayner N. Larson, being sworn, says that he is one of the attorneys for the plaintiffs named herein; that he has read the foregoing petition and knows the contents thereof; and that the same is true.

HAYNER N. LARSON.

Subscribed and sworn to before me this 5th day of July, 1935.

CAROL NESS,
Notary Public, Hennepin County, Minn.

My Commission Expires April 22, 1940.

(Notarial Seal)

---

72 (Order granting Petition for Rehearing and setting same for Argument.)

Upon the foregoing verified petition

It Is Hereby Ordered that said petition for rehearing be and the same hereby is set down for argument before the Court in chambers at 10:00 o'clock A. M. on the 16th day of July, 1935, in the Federal Building, Minneapolis, Minnesota.

It Is Hereby Further Ordered that a copy of this order together with said verified petition be served upon the United States District Attorney, attorney for the defendant, not later than two days from the date hereof.

By The Court

GUNNAR H. NORDBYE.

Dated this 5 day of July, 1935.

Due and personal service of the within Petition for Rehearing and Order Granting Rehearing is hereby admitted this 6th day of July, 1935.

GEORGE F. SULLIVAN,
United States District Attorney.

(Endorsed): Filed July 12, 1935, Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

---

73 Order Modifying Order of July 1, 1935, and Overruling Demurrer.

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray and R. H. M. Robinson, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, debtor, Plaintiffs

No. 3391. vs. Law.

United States of America, Defendant.

This matter came before the Court on the petition of the plaintiffs for a rehearing; the Court having heretofore filed its order on July 1, 1935, sustaining defendant's demurrer to the complaint, with leave granted, however, to the plaintiffs to amend.

At the argument on the petition for rehearing, it was called to the Court's attention that the complaint in Paragraph Thirteen refers to, and makes a part thereof, a settlement agreement, Exhibit "G", which was signed by the Commissioner of Internal Revenue on July 7, 1933, and was approved by the Secretary of the Treasury on the same date. This closing agreement was made in pursuance of Section 606, Revenue Act of 1928, to determine the amount of tax
74 legally owing for each of the years 1922-25, inclusive. The amount of the taxes sought to be recovered herein for said years reflects the difference between the amount actually paid by the taxpayer and the true amount found to be due by the terms of the closing agreement.

Plaintiffs take the position that, in that the closing agreement is binding on the plaintiffs and the Government in absence of fraud or misstatement of a material fact, the amount of overpayment for the years in question has been conclusively established, and is therefore binding upon the Collector of Internal Revenue who exacted the overpayment from the taxpayer in the first instance. Plaintiffs further urge that to require the taxpayer to set forth in the complaint the basic facts and circumstances giving rise to the overpayment would be mere surplusage and immaterial in light of the closing agreement, and further, that it would be an idle and unnecessary ceremony to require the taxpayer to plead and prove anything more than the closing agreement in order to prove the overpayment for the years in question. After reflection, the Court is of the opinion that the original order filed on July 1, 1935, failed to give weight to the closing agreement and to the reliance of the plaintiffs thereunder. When the matter was originally presented, the Court gathered

from the arguments of counsel, and from the briefs submitted, that the plaintiffs were seeking to establish their cause of action by reason of the issuance of the certificates of over-
assessment by the Commissioner and assumed that
75 plaintiffs were endeavoring to establish an account
stated or implied promise on the part of the Government by reason of such documents. However, the closing agreement is in no way identified with the certificates of overassessment, except that such agreement may have formed the basis for the issuance of such certificates, and it must be recognized that plaintiffs have certain rights under the statute by reason of such closing agreement that are clearly distinguishable from any rights that may arise by reason of the so-called account stated. The Court has been cited to no authority which intimates that such closing agreement is not provable in a suit against the Collector, and no cogent reason is suggested to the contrary. Section 606 was passed to facilitate the adjustment of tax claims. The taxes in question were paid to the Collector. He is chargeable with the erroneous collection of any excess moneys that were paid to him in his capacity as Collector. Now that the Government, by its solemn agreement entered into pursuant to statute, has acknowledged that its Collector exacted more money than was due for the years 1922-25, inclusive, it must be apparent that the Collector is not in a position to contradict the terms of the closing agreement. Presumably, such an agreement is binding upon him and takes the place of the proof that is ordinarily required by the taxpayer in making out a case against the Collector for an overpayment. It is conceded
that the Government failed to return these taxes, and
76 the Court has already found that the failure of the
Government is tantamount to a rejection of plaintiffs' claim. In proceeding against the Collector, the plaintiffs will have made out a prima facie case in proving the claim for refund that was filed, the facts indicating a refusal on the part of the Government to refund the taxes, and the agreement between the Government and the taxpayer as to the admitted overpayment. The proof by the Government to the effect that the overpayment was applied to a deficiency that existed in prior years will undoubtedly require the plaintiffs to go ahead with proof and sustain the burden that the Government erred in so applying the overpayment.

The Court having sustained the demurrer solely on the grounds of insufficient facts being pleaded to establish an erroneous and illegal collection of the 1922-25 taxes by the Collector, and in view of the views herein expressed as to the materiality and conclusiveness of the closing agreement in

absence of fraud and misrepresentation, it therefore follows that the bill of complaint, in the Court's opinion, states a cause of action, and that the Court has jurisdiction of the subject of the action. Therefore, the order filed July 1, 1935, sustaining the demurrer is amended and supplemented by the views hereinbefore set forth, and the order sustaining the demurrer and dismissal of the bill be and the same hereby is stricken, and in lieu thereof,

It Is Ordered that the demurrer to the bill be and the same hereby is overruled and defendant have twenty days
77 after the filing of this order within which to file its answer herein.

Dated this 30th day of July, 1935.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed): Filed July 30, 1935, Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

---

78 Answer.

Now comes the defendant United States of America and for its answer to the petition of the plaintiffs herein alleges and states:

I.

Defendant admits that Levi M. Willcuts was the duly appointed, qualified and acting Collector of Internal Revenue for the District of Minnesota from the first day of June, 1921, to the 31st day of July, 1933, inclusive. That since the last mentioned date he has not been and is not now in office as Collector of Internal Revenue. Except as so admitted, defendant denies each and every allegation in Paragraph I of the petition.

II.

Defendant admits the allegations contained in Paragraphs II to XIII inclusive of the petition.

III.

Defendant admits the allegations contained in Subdivision (a) of Paragraph XIV.

Defendant admits that while said proceedings were pending before the Board, the company and its affiliates held conferences with the Commissioner and other representatives of the Treasury Department for the purpose of ascertaining

and agreeing upon the amount of tax owing for each
79 of the said years 1917 to 1920 inclusive and that as the result of said conferences a written stipulation, dated February 25, 1926, was entered into and the first paragraph of said stipulation was as is set forth in said Subdivision (b) of Paragraph XIV of the petition herein and that the last paragraph of said stipulation was as set forth in said Subdivision (b) of Paragraph XIV of the petition herein. Except as herein admitted, defendant denies each and every other matter set forth in Subdivision (b) of Paragraph XIV of the petition herein.

Defendant admits the allegations contained in Subdivision (c) of Paragraph XIV of the petition.

Defendant admits that on March 6, 1926, a stipulation was filed with the Board as set out in Subdivision (f) of Paragraph XIV and that on the same day the Board entered three orders determining the amount owing for each year involved. The amount owing for 1917 was covered in one order; the amount owing for 1918 was covered in another order; and the amount owing for each of the years 1919 and 1920 was covered in the third order. That the order relating to 1917 was as set out in said Subdivision (f) of Paragraph XIV. Defendant further admits that pursuant to the said orders of the Board, the Commissioner caused the Collector to make, and on March 12, 1926, the Collector did make, demand upon the company for payment of the amount of tax liability so assessed for the years 1917 to 1920 inclusive, and on March 22, 1926, in compliance with said demand, the company paid to the Collector $3,044,807.39.

Defendant admits the allegations contained in Subdivision (h) of Paragraph XIV of the petition herein, except that it is specifically denied that the company sustained a consolidated net loss for the year 1926.

Defendant admits the allegations contained in Subdivision (i) of Paragraph XIV of the petition herein, except that it is specifically denied that the company sustained a consolidated net loss for the year 1927.

80 Defendant admits the allegations contained in Subdivision (j) of Paragraph XIV of the petition herein, except that the defendant specifically denies that the company sustained a consolidated net loss for the year 1928.

Except as herein admitted, qualified, or alleged defendant denies each and every matter and thing in Paragraph XIV of the petition contained and each and every part thereof.

IV.

Defendant admits that on April 23, 1930, pursuant to a demand of the Collector the company paid to him $7,758.58, together with interest thereon of $518.34, as taxes claimed by the Commissioner of Internal Revenue to be owing by the company for 1928. Except as so admitted, defendant denies the allegations contained in Subdivision (a) of Paragraph XV of the petition.

Defendant admits the allegations contained in Subdivision (b) of Paragraph XV of the petition.

V.

Defendant admits the allegations contained in Subdivision (a) of Paragraph XVI of the petition.

Defendant admits that during all such time as alleged in Subdivision (b) of Paragraph XVI that the Fort Frances company has been engaged in the manufacture of newsprint at Fort Frances, Ontario, and for that purpose has used a plant leased from the Ontario and Minnesota Power Company, Limited. Except as so admitted, defendant denies the allegations of Subdivision (b) of Paragraph XVI of the petition.

Defendant denies the allegations contained in Subdivision (c) of Paragraph XVI of the petition.

81 Defendant admits the allegation contained in Subdivision (d) of Paragraph XVI that the books of both the company and Fort Frances at all times mentioned have been kept on the accrual basis and returns of income have been made on that basis. Defendant further admits that the amounts set up on the company's books for interest accrued on unpaid balances owing for newsprint purchased by the plaintiff from Fort Frances for the year 1921 was $164,525.98. Except as so admitted, defendant denies the allegations contained in Subdivision (d) of Paragraph XVI.

Defendant admits the allegations contained in Subdivision (f) of Paragraph XVI of the petition.

As to Subdivision (g) of Paragraph XVI, defendant admits that on or about July 7, 1933, by reason of said interest item of $164,525.98, the Commissioner of Internal Revenue of the United States assessed against plaintiffs as receivers of the company a withholding tax thereon of $16,452.60 together with a penalty of $4,113.15, a total of $20,565.75. Thereafter and on or about July 15, 1933, said total amounts so claimed as owing, together with interest thereon of $10,-

556.14, except as to $311.43 thereof, was collected and satisfied by application thereto as credits of the 1922 interest item of $24,034.76, of the 1923 interest item $1,255.69, of the 1924 interest item $3,038.92, and of the 1925 interest item of $2,501.09.

Except as herein admitted, qualified and alleged, defendant specifically denies each and every matter and thing in Paragraph XVI of the petition and each and every part thereof.

VI.

As and for a further and affirmative defense, the defendant alleges that the purported causes of action, set out in plaintiff's petition for the recovery of the taxes collected for the years 1922 to 1925 inclusive, are barred by the statute of limitations properly applicable thereto, for the reason that the taxes for said years were paid on the dates and in the amounts as alleged in plaintiff's petition, and that
82 accordingly this action was commenced more than five years after the payment of said taxes and was therefore commenced after suit for the collection of said taxes was barred by the statute of limitations properly applicable thereto.

VII.

As and for a further and second affirmative defense, the defendant alleges: That and as will appear from the allegations of the plaintiff's petition, the amounts sought to be recovered in this action as claimed overpayments of tax for the respective years 1922 to 1925 inclusive were, by the Commissioner of Internal Revenue, by and through certificates of overassessment issued by him for those years, determined to be overpayments for the said years 1922 to 1925 inclusive, and the amounts so determined to be overpayments for the said years were by the said Commissioner, pursuant to the statute in such case made and provided, credited on deficiency assessments made and entered by the said Commissioner against the taxpayer for the respective years 1926 to 1928 inclusive, and the year 1921, which last mentioned assessments were then and there not barred of collection, but were then and there outstanding and unpaid and collectible by distraint; that accordingly any claims that plaintiff may have had on account of overpayments of taxes for the said respective years 1922 to 1925 inclusive were, prior to the commencement of this action, fully paid and satisfied by the said act of the Commissioner in crediting such overpayments to the said subsisting deficiency assessments against the taxpayer for the said respective years 1926 to 1928 inclusive, and the said year 1921.

VIII.

Except as herein admitted, qualified and alleged, defendant denies each and every matter and thing in said petition contained and each and every part thereof. Defendant specifically denies that it is indebted to the plaintiff in the sums alleged in the complaint or in any amount.

Wherefore, Defendant prays that the petition of the
83 plaintiff be in all respects dismissed and that defendant have judgment for its costs and disbursements herein.

Dated: August 16, 1935.

GEORGE F. SULLIVAN,
United States Attorney.

LINUS J. HAMMOND,
Asst. United States Attorney.

Attorneys for Defendant
221 Federal Courts Building
Saint Paul, Minnesota.

84 State of Minnesota,
County of Ramsey—ss.

Linus J. Hammond, being first duly sworn according to law, says that he is an Assistant United States Attorney for the District of Minnesota and that he has read the foregoing Answer and that the allegations contained therein are true as he verily believes.

LINUS J. HAMMOND.

Subscribed and sworn to before me this 16th day of August, 1935.

ADELE L. GUERIN,
(Notarial Seal) Notary Public, Ramsey County, Minn.

My commission expires Oct. 26, 1938.

Service of the within Answer is admitted this 17th day of August, 1935.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiff.

(Endorsed): Filed August 19, 1935. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

85 Reply.

Come now the plaintiffs and for their reply to defendant's answer deny each and every allegation in said answer contained.

Wherefore plaintiffs pray that judgment be granted as in their petition asked.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiffs,
1260 Northwestern Bank Building,
Minneapolis, Minnesota.

Cobb, Hoke, Benson, Krause & Faegre,
Of Counsel.

86 State of Minnesota,
County of Hennepin—ss.

C. T. Jaffray, being sworn, says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing reply and knows the contents thereof; that the same is true.

C. T. JAFFRAY.

Subscribed and sworn to before me this 19th day of August, 1935.

C. O. HOLMER,
(Notarial Seal) Notary Public, Hennepin County, Minn.

My Commission expires April 15, 1941.

Service of the within Reply is admitted this 21st day of August, 1935.

GEORGE F. SULLIVAN,
Attorney for Defendant.

(Endorsed): Filed August 23, 1935. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

---

87 (Order Amending Petition.)

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer as Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. At Law.
United States of America, Defendant.

Upon motion therefor duly made,

It Is Ordered that the last sentence of paragraph b of Section XVI of plaintiffs' petition be and the same hereby is amended so as to read as follows:

At no time has the Fort Frances Company maintained any sales representative in the United States, but during all the time herein mentioned it has maintained and still does maintain an office in the United States.

GUNNAR H. NORDBYE,
Judge of the District Court.

Dated May 4, 1936.

---

88 (Motion of Plaintiffs for Leave to Amend Petition.)

Come now the plaintiffs and move the Court for an order permitting the amendment of and amending the last sentence of paragraph b of Section XVI of their petition so as to read as follows:

At no time has the Fort Frances Company maintained any sales representative in the United States, but during all the time herein mentioned it has maintained and still does maintain an office in the United States.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiffs.

Dated May 4, 1936.

(Endorsed): Filed May 4, 1936. Margaret L. Mullane, Clerk. By Frances C. Baxter, Deputy.

---

89 (Findings of Fact and Conclusions of Law of District Court.)

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. Law.
United States of America, Defendant.

The above-entitled matter having been placed upon the general term calendar came on for hearing before the undersigned, one of the Judges of the above-named Court, without a jury, a jury having been specifically waived.

Mr. J. B. Faegre and Mr. Hayner N. Larson, with Messrs. Cobb, Hoke, Benson, Krause and Faegre of counsel, appeared as attorneys for the plaintiffs; and

Mr. George F. Sullivan, United States Attorney, Mr. Linus J. Hammond, Assistant United States Attorney, Mr. Robert H. Jackson, Assistant Attorney General, and Mr. Andrew D. Sharpe and Mr. John E. Garvey, Special Assistants to the Attorney General, appeared for the United States.

The Court having heard the arguments of counsel, and upon the evidence introduced and consideration of
90 the briefs and all the files and records herein, makes the following

Findings of Fact.

I.

Minnesota and Ontario Paper Company is a corporation organized and existing under the laws of the State of Maine. It is hereinafter referred to as the Paper Company. Fort Frances Pulp and Paper Company, Limited, is a corporation organized and existing under the laws of the Province of Ontario, Canada. It is hereinafter referred to as the Fort Frances Company. Ontario and Minnesota Power Company, Limited, is a corporation organized and existing under the laws of the Province of Ontario, Canada. It is hereinafter referred to as the Power Company.

II.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer now are, and at all times since September 29, 1934, have been, pursuant to an order of this Court that day made and entered under Section 77B of the Bankruptcy Act, the duly appointed, qualified, and acting trustees of the estate of the Paper Company, debtor. Between July 11, 1934, and said September 29, 1934, C. T. Jaffray and R. H. M. Robinson, pursuant to an order of this Court made and entered under said Act on July 11, 1934, were the duly appointed, qualified, and acting temporary trustees of the estate of the Paper Company, debtor. From November 30, 1931, until their appointment as such temporary trustees on July 11, 1934, Jaffray and Robinson were the duly appointed,
91 qualified, and acting receivers of the Paper Company.

III.

From 1917 to 1920, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with the following corporations: International Lumber Company, Rainy River Improvement Company, Minnesota, Dakota and Western Railway Company, Falls Lumber and Coal Company, Watrous Island Boom Company, and International Insulation Company. From 1921 to 1925, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with all said named corporations except International Insulation Company. From 1926 to 1928, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with all said named corporations, together with Minnesota Forest Products Company, a corporation. The corporations affiliated with the Paper Company are sometimes herein referred to as "affiliates".

During each of said three periods, the annual earnings or net income of the Paper Company and its affiliates were consolidated for income-tax purposes. All taxes paid on such consolidated earnings or net income have been paid by the Paper Company.

IV.

All income taxes paid by the Paper Company to the United States for the years 1922 to 1925, inclusive,
92 were paid to one Levi M. Willcuts as the duly appointed, qualified, and acting Collector of Internal Revenue for the District of Minnesota. Willcuts was such Collector from June 1, 1921, to July 31, 1933, inclusive. Since the latter date he has not been and is not now in office as Collector of Internal Revenue. Whenever herein the word "Collector" is used, reference is made to said Willcuts as Collector of Internal Revenue for the District of Minnesota.

V.

On March 14, 1923, the Paper Company filed with the Collector a tentative return of consolidated net income of itself and affiliates for 1922 and at the time of such filing paid to the Collector $17,500 in part payment of the estimated tax. On June 15, 1923, the Paper Company filed with the Collector a completed return of the 1922 consolidated net income of itself and affiliates. Said completed return showed a tax of $66,818.77, which amount, except for the payment of $17,500 already made, was paid to the Collector as follows:

June 15, 1923	$15,909.39
September 15, 1923	16,704.70
December 15, 1923	16,704.68

On June 4, 1927, the Paper Company filed with the Collector a claim for refund of the $66,818.77 paid to him as income tax for 1922. On April 30, 1929, a further claim for refund of said tax was filed with the Collector.

VI.

On March 15, 1924, the Paper Company filed with the
93 Collector a tentative return of consolidated net income of itself and affiliates for 1923 and at the time of such filing paid to the Collector $58,000 in part payment of the estimated tax. On June 14, 1924, the Paper Company filed with the Collector a completed return of the 1923 consolidated net income of itself and affiliates. Said completed return showed a tax of $166,352.88, which amount, except for the payment of $58,000 already made, was paid to the Collector as follows:

June 14, 1924	$25,175.44
September 14, 1924	41,588.22
December 14, 1924	41,588.22

On July 20, 1927, the Paper Company filed with the Collector a claim for refund of $110,241.81 of the income taxes paid to him for 1923. On or about December 10, 1928, a further claim for refund was filed with the Collector wherein the amount of the 1923 income taxes claimed as refundable was reduced to $86,355.86. On April 30, 1929, a second further claim for refund was filed with the Collector wherein refund was again claimed of said $86,355.86.

VII.

On March 14, 1925, the Paper Company filed with the Collector a tentative return of consolidated net income of itself and affiliates for 1924 and at the time of such filing paid to the Collector $15,000 in part payment of the estimated tax. On June 15, 1925, the Paper Company filed with the Collector a completed return of the 1924 consolidated net
94 income of itself and affiliates. Said completed return showed a tax of $70,926.94, which amount, except for the payment of $15,000 already made, was paid to the Collector as follows:

June 15, 1925	$20,463.47
September 14, 1925	17,731.74
December 14, 1925	17,731.73

On December 24, 1927, the Paper Company filed with the Collector a claim for refund of $36,904.69 of the income taxes paid to him for 1924. On March 13, 1929, the Paper Company filed with the Collector a further claim for refund wherein the amount of the 1924 taxes claimed as refundable was reduced to $29,882.76. On April 30, 1929, the Paper Company filed with the Collector a second further claim for refund wherein the amount of 1924 taxes claimed as refundable was increased to $49,670.56.

VIII.

On March 13, 1926, the Paper Company filed with the Collector a tentative return of the consolidated net income of itself and affiliates for 1925 and at the time of such filing paid to the Collector $10,000 thereon. On June 1, 1926, the Paper Company filed with the Collector a completed return of the 1925 consolidated net income of itself and affiliates. Said completed return showed a tax of $9,365.77, which amount was less than the sum already paid by $624.23, which last amount the Collector refunded to the Paper Company on October 23, 1926.

On December 24, 1927, the Paper Company filed with
95 the Collector a claim for refund of $8,515.30 of the income tax paid to him for 1925. On March 13, 1929, the Paper Company filed with the Collector a further claim for refund wherein the amount of 1925 taxes claimed as refundable was reduced to $6,401.49. On April 30, 1929, the Paper Company filed with the Collector a second further claim for refund wherein the amount of 1925 taxes claimed as refundable was further reduced to $3,400.75.

IX.

(a) In February, 1921, and March, 1924, the Commissioner of Internal Revenue, hereinafter called the "Commissioner," assessed an aggregate amount of $759,838.91 as additional taxes upon the 1917 consolidated income of the Paper Company and its affiliates. In March, 1924, the Commissioner assessed $884,665.66 as additional taxes upon the 1918 consolidated income of the Paper Company and its affiliates. Claims for abatement of $498,111.21 of the 1917 assessment were rejected on February 4, 1925. A claim for abatement of the 1918 assessment was rejected January 23, 1925. On January 23, 1925, the Commissioner notified the Paper Company and its affiliates of his determination of deficiencies of $613,248.82 and $1,403,435.47 in taxes upon the consolidated income of the Paper Company and its affiliates for 1919 and 1920, respectively. On February 21, 1925, the

Paper Company and its affiliates filed petitions with the United States Board of Tax Appeals, hereinafter called the Board, for redetermination of the said additional taxes assessed for 1917 and 1918. On March 19, 1925, the
96 Paper Company and its affiliates filed petitions with the Board for redetermination of the deficiencies determined for 1919 and 1920.

(b) While said proceedings were pending before the Board, the Paper Company and its affiliates held conferences with the Commissioner and other representatives of the Treasury Department for the purpose of ascertaining and agreeing upon the amount of tax owed for each of said years 1917 to 1920, inclusive. As the result of said conferences, the Paper Company and the Commissioner entered into a written stipulation dated February 25, 1926. Said stipulation was filed with the Board February 26, 1926. The first paragraph of said stipulation was as follows:

"It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the 'taxpayer,' by its counsel, that the deficiency in tax of said taxpayer for the taxable years 1917, 1918, 1919, and 1920 shall be determined and assessed in accordance with the following agreement."

Following that paragraph the facts ascertained and agreed upon were set out in detail as to each item in dispute. The last paragraph of said stipulation was as follows:

"It is further stipulated and agreed that the understatement of the amount of the taxable net income as shown by the returns filed by the taxpayer herein for each of the taxable years 1917, 1918, 1919, and 1920 was due to negligence on the part of the taxpayer but without intent to defraud."

(c) By letter dated February 25, 1926, the Commissioner advised the Paper Company as follows:

97 "Confirming the agreement made with the Commissioner of Internal Revenue on February 24, 1926, you are advised that the amount of the penalty to be assessed against you as the result of the negligent understatement of your tax liability for the taxable years 1917, 1918, 1919, and 1920 will be compromised by accepting a sum equal to 6 per cent per annum on the amount of the deficiencies determined and assessed in accordance with the stipulation this date entered into between the taxpayer and the representative of

this office, from the date the deficiencies became due and payable to the date of payment."

(d) On February 26, 1926, the following further written stipulation was signed and filed with the Board:

"It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by its attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the 'taxpayer,' by its counsel, that the taxpayer's deficiency in tax for the taxable years 1917, 1918, 1919, and 1920 shall be determined by the Board of Tax Appeals in accordance with the agreement entered into between the taxpayer and the Commissioner on February 25, 1926, a copy of which is hereto attached, marked 'Exhibit A', and made a part of this stipulation."

The exhibit A attached to said stipulation is the written agreement of February 25, 1926, referred to in subparagraph (b) above.

(e) On February 26, 1926, the Board entered the following order in respect of said proceedings then pending before it:

"This appeal coming on to be heard on February 26, 1926, the taxpayer being represented by Ralph M. Shaw, Esq., and the Commissioner being represented by E. C. Lake, Esq., and it appearing that the parties have entered into a certain stipulation which was filed on this date, and it appearing that the parties have agreed to compute the tax in accordance with the stipulation aforesaid; Now, therefore, on agreement of counsel for both parties, it is

98 "Ordered, That the tax shall be computed in accordance with the stipulation filed this date and referred to hereinabove. Final determination of the deficiency will be made under rule 50 of the Board's Rules of Practice on consent of the parties or on 10 days' notice by either party to the adverse party."

(f) On March 6, 1926, the following further stipulation was filed with the Board in said proceedings:

"It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the 'taxpayer,' by its counsel, that the amount of the deficiency due from the taxpayer or overas-

sessment in the above-entitled appeals for each of the taxable years 1917, 1918, 1919 and 1920 is as follows:

	Tax	Penalty
1917, overassessment	$270,305.51	$227,633.03
1918, overassessment	532,722.18	139,897.55
1919, deficiency	491,360.53	165,934.19
1920, deficiency	920,772.85	255,514.47"

The above overassessments for the years 1917 and 1918 arose by reason of the Commissioner's assessing against the Paper Company additional taxes of $759,838.91 for the year 1917 and $884,665.66 for the year 1918. The additional taxes agreed upon as due by the Paper Company for the years 1917 and 1918 were in the respective amounts of $489,533.40 and $351,943.48, which amounts were respectively $270,305.51 and $532,722.18 less than the respective amounts theretofore assessed for said years as set forth in subparagraph (a) above. There was no assessment of the amounts designated "Penalty" prior to March 8, 1926.

(g) Pursuant to the stipulations filed as noted above,
99 the Board on March 6, 1926, entered three orders determining the amount owing for each year involved. The amount owing for 1917 was covered in one order; the amount owing for 1918 was covered in another order; and the amount owing for each of the years 1919 and 1920 was covered in the third order. All the orders were similar in form and content except as to the amounts stated therein. The order relating to 1917 was as follows:

"Now on the 6th day of March, 1926, the above-entitled appeal coming on to be heard on the stipulation of the taxpayer and the commissioner, signed and executed by their respective counsel, and it appearing from said stipulation and other documentary evidence submitted that the true tax liability of the Minnesota & Ontario Paper Company and its affiliated corporations for the taxable year 1917 is $531,073.65, of which the sum of $41,540.25 has heretofore been paid, and the sum of $801,379.16 has heretofore been assessed, and it further appearing that there is due a penalty of $227,633.03, no part of which has been assessed or paid:

"Now, therefore, it is considered and

"Ordered that the amount of tax deficiency and penalty due from the taxpayer be, and the same is hereby redetermined for the year 1917 to be $489,533.40 tax and $227,633.03 penalty, and that of the tax heretofore assessed there shall be abated the sum of $270,305.51 and the amount of the penalty of $227,633.03 shall be assessed and paid."

The stipulation referred to in said order is the stipulation quoted in subparagraph (f) above. The "other documentary evidence" referred to in said orders is a computation prepared by representatives of the Paper Company and its affiliates and the Commissioner and filed with the Board March 6, 1926. Therein the addition to the tax for
100 each year computed at the rate of six per centum per annum is designated both "penalty interest" and "interest". Said computation was made pursuant to and in accordance with the stipulation referred to in subparagraph (b) above and the letter of the Commissioner referred to in subparagraph (c) above, as well as the Board's order of February 26, 1926, referred to in subparagraph (e) above.

(h) Thereafter, on March 8, 1926, the Commissioner, in accordance with the Board's orders, assessed on his March, 1926, assessment list the amounts of the deficiencies for 1919 and 1920 and the amounts designated as "penalties" for 1917, 1918, 1919, and 1920, and issued certificates of overassessment of the amounts to be abated for the years 1917 and 1918. On March 12, 1926, the Collector issued notices and made demand for each of the years as follows:

Year	Tax	Amount called "Penalty" in Board's orders	Interest	Total
1917	$ 489,533.40	$227,633.03		$ 717,166.43
1918	351,943.48	139,897.55		491,841.03
1919	491,360.53	165,834.17	807.71	658,022.41
1920	920,772.85	255,514.46	1,513.59	1,177,800.90
Total	$2,253,610.26	$788,879.21	$2,321.30	$3,044,810.77

The total of the amounts designated as "Penalty" and of the interest is $791,200.51.

On March 22, 1926, the Paper Company paid to the Collector $3,044,810.77, the sum of the foregoing demands.

In said assessment list of March, 1926, the amount of the addition to the tax computed at the rate of six per cent per annum is set out as a separate and distinct item in respect of each of the years 1917 to 1920, inclusive.

101 X.

On June 15, 1927, the Paper Company filed with the Collector its consolidated income tax return for the year 1926 reporting thereon a consolidated net loss and no tax liability. On October 28, 1931, the Commissioner advised the Paper Company that an audit of its return disclosed a tax

liability of $41,566.02, which amount, together with interest of $11,539.98, or a total of $53,106.00, was, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed on the October 31, 1931 Assessment List for the District of Minnesota. The Commissioner made a further audit of the Paper Company's return for the year 1926, and as a result thereof issued a certificate of overassessment bearing the number 1316756. By said certificate $10,222.00 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed for 1926 but outstanding and unpaid as follows: income taxes, $33,565.47; interest thereon to October 31, 1931, $9,318.53; total, $42,884.00.

XI.

On June 15, 1928, the Paper Company filed with the Collector its consolidated income tax return for the year 1927 reporting a consolidated net loss and no tax liability. On the October 31, 1931 Assessment list for the District of Minnesota, the Commissioner, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed a tax for 1927 of $50,010.72, together with interest of $10,893.84, a total of $60,-
102 894.56. The Commissioner made a further audit of such return for the year 1927 and as a result thereof issued a certificate of overassessment bearing the number 1316757. By said certificate $13,449.44 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed for 1927 but outstanding and unpaid as follows: income taxes, $38,965.14; interest thereon to October 31, 1931, $8,479.98; total, $47,445.12.

XII.

(a) On May 11, 1929, the Paper Company filed with the Collector its consolidated income tax return for the year 1928 reporting a consolidated net loss and no tax liability. The Commissioner, upon an audit of said return, determined a deficiency in tax for the said year 1928 in the sum of $7,758.58 tax and $518.34 interest thereon, and on April 26, 1930, said amount was by the Commissioner assessed against the Paper Company, and the same was paid to the Collector as set out in subparagraph (b) hereof. On the October 31, 1931 Assessment List for the District of Minnesota, the Commissioner, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed an additional tax for 1928 against the Paper Company in the amount of $42,166.52 and interest thereon of $6,646.71, which amounts, together with the previous assessment, made April 26, 1930, of $7,758.58 in

taxes and $518.34 in interest thereon (which last amounts had been paid to the Collector prior to October 31, 1931, as hereinafter set out in subparagraph (b) hereof), made a total of $57,090.15. The Commissioner made a further
103 audit of such return for the year 1928 and as a result thereof issued a certificate of overassessment bearing the number 2223612. By said certificate $34,543.10 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed for the year 1928 but outstanding and unpaid as follows: income taxes, $12,774.52; interest thereon to October 31, 1931, $1,495.61; total, $14,270.13.

(b) On April 29, 1930, pursuant to a demand of the Collector, the Paper Company paid to him $7,758.58, together with interest thereon of $518.34, the additional tax and interest for the year 1928 assessed by the Commissioner on the April 26, 1930 Assessment List for the District of Minnesota. On February 9, 1932, the receivers filed a claim for refund of such additional tax and interest so paid. The grounds for refund were therein stated as follows:

"Reference is herewith made to a 'Statement of Objections' dated January 27, 1932, filed by C. T. Jaffray and R. H. M. Robinson, Receivers for Minnesota and Ontario Paper Company, against the additional assessment of corporation income taxes for years 1926, 1927 and 1928, and on basis of said statement, the taxpayer is entitled to a refund for the year 1928 amounting to $7,758.58 plus interest thereon as provided by law.

"All of the facts recited in said statement are incorporated herein by reference with the same force and effect as if fully rewritten herein."

The "Statement of Objections" dated January 27, 1932, to which the claim for refund makes reference, alleged as error the disallowance by the Commissioner of the
104 deduction for 1926 of $790,355.20 of the amount of $791,200.51 referred to in Section IX (h) above. Said claim for refund was rejected by the Commissioner and the receivers of the Paper Company notified thereof by letter dated July 13, 1933.

XIII.

In making his final determination of income-tax liability for the year 1926, the Commissioner did not allow as a deduction the item of $788,879.21 designated in the Board's orders as penalties, and did not allow as a deduction $1,475.99

of the amount paid by the Paper Company as interest, all as set out in paragraph IX (h) hereof. In arriving at the total tax liability of $33,565.47 for the year 1926, the Commissioner determined a consolidated net income of $248,-633.10. In arriving at the total tax liability of $38,965.14 for the year 1927, the Commissioner determined a consolidated net income of $288,630.69. In arriving at the total tax liability of $20,533.10 for the year 1928, the Commissioner determined a consolidated net income of $187,094.55. The foregoing consolidated net incomes for the years 1926, 1927, and 1928, were arrived at as to each company of the affiliated group as follows:

Year 1926		
Net Income:		
Minnesota and Ontario Paper Company		$462,609.08
Falls Lumber and Coal Company		41,400.37
		$504,009.45
Less Net Losses:		
International Lumber Company	$163,108.72	
Minnesota, Dakota & West. Ry. Co.	16,874.38	
Rainy River Improvement Company	19,860.81	
Minnesota Forest Products Company	55,532.44	255,376.35
Consolidated Net Income for 1926		$248,633.10
Year 1927		
Net Income:		
Minnesota and Ontario Paper Company		$678,568.62
Falls Lumber & Coal Company		32,490.43
		$711,059.05
Less Net Losses:		
International Lumber Company	$312,502.11	
Minnesota, Dakota & West. Ry. Co.	36,222.37	
Rainy River Improvement Co.	20,519.49	
Minnesota Forest Products Co.	53,184.39	422,428.36
Consolidated Net Income for 1927		$288,630.69
Year 1928		
Net Income:		
Minnesota and Ontario Paper Company		$314,796.00
Minnesota Dakota and Western Railway Co.		48,828.43
Falls Lumber and Coal Company		21,967.71
		$385,592.14
Less Net Losses:		
International Lumber Company	$130,016.31	
Rainy River Improvement Co.	14,719.76	
Minnesota Forest Products Co.	53,761.52	198,497.59
Consolidated Net Income for 1928		$187,094.55

105

XIV.

On June 12, 1933, the Paper Company and its affiliates executed, and on July 7, 1933, the Commissioner executed, with the approval of the Secretary of the Treasury on the same day given, an agreement entered into under and in pursuance of Section 606 of the Revenue Act of 1928. The agreement provided in part as follows:

"Whereas, there has been a determination of the tax liability of said taxpayers in respect of income tax imposed by the Revenue Acts of 1921, 1924, 1926 and 1928, for each taxable period stated above falling under the provisions of these acts in the sum of

106 $17,500.00 for the calendar year 1922,
136,925.19 for the calendar year 1923,
47,022.71 for the calendar year 1924,
1,565.77 for the calendar year 1925,
33,565.47 for the calendar year 1926,
38,965.14 for the calendar year 1927, and
20,533.10 for the calendar year 1928,

exclusive of any penalty or interest applicable thereto as provided by law:

"Now, This Agreement Witnesseth, that said taxpayers and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if this agreement is approved by the Secretary of the Treasury, or the Under Secretary, within one year from the date this Agreement is signed by said taxpayers.

"Reserving, however, to the taxpayers the right to contest the disallowance of the deduction claimed for the year 1926 in the amount of $790,455.20, which amount was paid, on March 22, 1926, to the United States Government in connection with the payment of additional Federal income, war-profits and excess-profits taxes for the calendar years 1917 to 1920, inclusive, and which amount the taxpayers contend was deductible as interest on deficiencies in taxes, and/or was deductible as a penalty, which contentions the Government denies, and reserving to the taxpayers the right to any benefit from the reduction in Federal income taxes, for the years 1926, 1927 and 1928, that will result in the event of a final conclusion of the issues favorable to the taxpayers."

XV.

(a) The Paper Company was organized in 1908 as the Minnesota and Ontario Power Company; its name was changed in 1918 to the Minnesota and Ontario Paper Company.

(b) Upon organization the Paper Company built a newsprint mill at a power site on the Rainy River at International Falls, Minnesota. The Rainy River is part of the boundary between the United States and Canada. After a few years the output of the International Falls mill was
107 inadequate to meet the demands of the Paper Company's customers, and steps were taken by the Paper Company to establish another newsprint paper mill on the Canadian side of the power site in the Town of Fort Frances, Ontario. For that purpose, the Paper Company caused the Power Company, all of whose capital stock the Paper Company then and at all times since has owned, to develop the power on the Canadian side of the Rainy River in Fort Frances, and to erect there a second newsprint paper mill, which was completed in 1914. At about the same time the Paper Company caused the Fort Frances Company to be organized to operate this second mill, and took title to all the latter's then-issued capital stock, which consisted of 500 shares; in 1920 the Fort Frances Company issued 28,100 additional shares, all of which became and have since been owned by the Power Company.

(c) The newsprint paper mill at Fort Frances has ever since erection been owned by the Power Company, but has at all times been operated by the Fort Frances Company under lease from the former. The Fort Frances Company has never had any business other than the operation of said mill.

(d) In addition to holding title to the newsprint paper mill, the Power Company has engaged solely in the production and sale of electric power to the Fort Frances Company and to the inhabitants of the Town of Fort Frances and of the Township of McIrvine in Canada. By far the greater proportion of the power has at all times been furnished to and consumed by the Fort Frances Com-
108 pany. The power site was developed by the Power Company for the purpose of supplying electric power for the operation of its newsprint paper mill. The furnishing of electricity to the inhabitants was imposed as a condition of the granting of the right to develop the power site.

(e) About 1909 the Paper Company, upon commencement of its newsprint manufacturing operations, organized a sales department for the purpose of selling and it did sell its product to newspaper publishers in the Middle West of the United States. The demand for newsprint paper soon exceeded the productive capacity of the International Falls mill alone, and ever since the commencement of operations at the Fort Frances mill the newsprint paper necessary to meet this excess demand has been supplied to the Paper Company in large part by the Fort Frances Company. Prior to 1921, the paper furnished to the Paper Company by the Fort Frances Company was furnished pursuant to written contracts between them. The written contract for 1920 stated that the Fort Frances Company agreed to sell and the Paper Company agreed to buy during that year 30,000 tons, more or less, subject to the following, among other conditions:

(1) Delivery of the paper to the Minnesota Company shall be made on board cars at Fort Frances, Ontario;

(2) The price shall be adjusted from month to month and shall be a price equal to the average price at which the Minnesota Company may sell paper during the month, less a discount of five per cent.

(f) Since 1920 there have been no written contracts respecting newsprint paper supplied to the Paper Com-
109 pany by the Fort Frances Company. Since the beginning of 1921 the practice of the two companies as respects newsprint paper supplied to the Paper Company by the Fort Frances Company has been as follows:

From time to time the paper Company advises the Fort Frances Company at Fort Frances that the Paper Company requires certain quantities of newsprint paper. Upon receipt of such advice, the Fort Frances Company regulates manufacturing operations of the Fort Frances mill so as to turn out quantities of paper as required by the Paper Company. As the manufactured paper comes from the paper machines, it is wrapped, weighed, and delivered to railroad carriers by loading into freight cars held in readiness to receive the same on the tracks on the Fort Frances mill property. At the time of delivery of the paper to the carriers, the Fort Frances Company invoices the Paper Company for the paper then delivered. Such invoices have uniformly been signed by the Paper Company as follows:

Certified Correct

MINNESOTA & ONTARIO PAPER CO.,
Per (Signature of Officer or employee)
Agent for Importer.

All shipping instructions to carriers covering paper supplied as aforesaid have been furnished and given to the carriers by the Paper Company. All transportation charges from the Fort Frances mill have been paid by the Paper Company. Practically all the paper supplied to the Paper Company has been shipped by the Paper Company
110 into the United States. All Consumption Entry Papers (commonly known as customs papers) relating to the paper so shipped have been arranged for and signed by the Paper Company. In such customs papers the Paper Company has uniformly been described and has executed the same as purchaser, owner, and importer.

At no time has the Fort Frances Company had storage facilities for any substantial amount of manufactured newsprint paper. Its storage capacity in respect of such paper has never been in excess of approximately 100 tons. Newsprint paper has been manufactured at the Fort Frances mill only pursuant to orders for the same already in hand.

All paper manufactured at the Fort Frances mill and supplied to publishers in the United States through the Paper Company has been supplied under and pursuant to a uniform type of written agreement wherein the Paper Company is called the seller and the publisher is called the purchaser and wherein such seller agrees to sell and deliver and such purchaser agrees to buy and pay for the number of tons of newsprint paper therein specified. The Paper Company has made all financial and credit arrangements with the publishers. All accounts with the publishers have run in the name of the Paper Company, which has made all collections upon the same. The Paper Company has charged interest at the rate of seven per cent per annum on unpaid publishers' accounts. At no time has the Paper Company been called upon to make or has made any accounting to the Fort Frances Company in respect of publishers' accounts,
111 financial and credit arrangements with publishers, or payments received or collected upon publishers' accounts.

(g) At no time has the Fort Frances Company had any selling organization of its own. During all years since and including 1921, there has been an established practice in the newsprint paper industry, in instances where the manufacturer does not have a selling organization of his own, of disposing of his product to independent distributors or selling concerns at prices which yield to the manufacturer ninety-seven per cent of the prevailing market price received by

the independent distributors or selling concerns from the publishers or consumers.

The price charged the Paper Company by the Fort Frances Company for newsprint paper supplied to the former as stated above has at all times since the beginning of 1921 been ninety-seven per cent of the prevailing market price charged to the newspaper publishers.

The amount of newsprint supplied to the Paper Company by the Fort Frances Company under the practice described above from 1921 to 1927, inclusive, together with the annual total price charged the Paper Company for the same and also the average price per ton is as follows:

Year	No. of Tons	Net Credits from Sales to M & O P. Co.	Average per Ton
1921	31,194.399	$3,030,314.02	$97.14
1922	37,885.930	2,617,135.31	69.08
1923	35,066.981	2,551,124.54	72.73
1924	38,172.5015	2,743,120.50	71.86
1925	41,235.419	2,790,294.94	67.69
1926	46,888.6095	2,956,304.71	63.05
1927	62,298.5835	3,927,748.58	63.05

112 (h) The books of both the Paper Company and the Fort Frances Company have at all times mentioned been kept on the accrual basis, and returns of income to the United States Government by the Paper Company have been made on that basis. From 1921 to 1926, inclusive, neither the Paper Company nor the Fort Frances Company entered on its books any accruals in respect of any interest on unpaid balances owing for newsprint supplied to the Paper Company by the Fort Frances Company. During the year 1926 changes were made in the accounting practices of both corporations, and the Paper Company then set up on such balances, which were in the form of open accounts, accrued interest for 1925 and 1926 in favor of the Fort Frances Company. In 1927 further accounting changes were made, and in connection therewith credits were then set up on the Paper Company's books in favor of the Fort Frances Company for interest accrued on such balances owing the Fort Frances Company for 1921 to 1924, inclusive. The amounts entered as aforesaid are as follows:

Interest for Year	Year in which entered	Interest credited to account of Fort Frances Company
1921	1927	$164,525.98
1922	1927	226,926.37
1923	1927	238,371.06
1924	1927	257,145.82
1925	1926	290,172.58
1926	1926	310,863.23

The interest so credited was computed at the rate of six per cent per annum. Entries corresponding to the foregoing entries made on the books of the Paper Company were
113 made at the same time on the books of the Fort Frances Company. No net amount of interest was credited in favor of the Fort Frances Company for 1927. In that year the Paper Company paid and discharged its obligation to the Fort Frances Company for all unpaid newsprint purchases, together with interest therefor on open account, by the transfer to the latter of certain assets; no payment of the interest accruals in favor of the Fort Frances Company had been made prior to that time.

(i) During 1921 to 1927, inclusive, the Paper Company owned bonds of the Power Company, issued by the latter to finance the construction of the power development and the Fort Frances newsprint mill, as well as to finance additions to said mill from time to time. Interest upon such bonds received by the Paper Company was reported to the United States Government as taxable income, and was in the amount of $210,000 for each of the years 1921 to 1924, inclusive, in the amount of $277,500 for 1925, in the amount of $300,000 for 1926, and in the amount of $390,000 for 1927.

(j) The following is a statement of the interest transactions between the Paper Company and the Fort Frances and Power companies for 1921 to 1927, inclusive, on account of the open accounts set up in respect of newsprint paper supplied to the Paper Company by the Fort Frances Company, and on account of interest on the bonds of the Power Company held by the Paper Company:

114

Year	Interest Charged to Paper Company by Ft. Frances Co. on open account	Interest credited to Paper Co. by Ft. Frances Co. on open account	Interest credited to Paper Co. by Power Co. on bonds
1921	$164,525.98	—	$210,000.00
1922	228,928.37	—	210,000.00
1923	238,371.06	—	210,000.00
1924	287,143.82	—	210,000.00
1925	299,172.56	—	277,500.00
1926	310,593.23	—	300,000.00
1927	—	$369,966.78	390,000.00

(k) The above interest paid by the Paper Company to the Fort Frances Company in the year 1927 was reported by the latter for income-tax purposes to the Government of the Dominion of Canada as income received and a tax has been

paid thereon by the Fort Frances Company to the Canadian Government. No income tax return of any nature and no payment of income tax of any nature was made to the United States by the Fort Frances Company in respect of the years 1921 to 1927, inclusive.

All cash payments made from time to time from 1921 to 1927, inclusive, by the Paper Company to or for the account of the Fort Frances Company on open account were paid in Canadian funds.

In arriving at its final income-tax liability for the years 1921 to 1926, inclusive, the Commissioner, in determining the net taxable income of the Paper Company for each of said years, allowed the Paper Company to offset the respective amounts of interest set forth in subparagraph (j) above as interest due, payable, and credited to the Fort Frances Company, against interest credited to the Paper Company by the Power Company and other Canadian
115 subsidiaries of the Paper Company. The Commissioner reduced the Paper Company's net taxable income accordingly. Such of the aforesaid offsets as related to 1922 to 1926, inclusive, were reflected in the amount of tax determined and agreed upon for each of said years in the agreement referred to in paragraph XIV above.

(l) In October, 1933, the Paper Company requested the Commissioner, pursuant to the provisions of Section 240 (f) of the Revenue Act of 1926 and of Section 240 (d) of the Revenue Acts of 1921 and 1924, to consolidate the accounts of the Paper Company, the Fort Frances Company, and the Power Company. The Commissioner has not acted upon said request and consolidation has not been made.

(m) Not later than March 15th of each of the years 1922 to 1927, inclusive, the Paper Company filed with the Collector for the preceding year on Form 1042 its "Annual Return of Income Tax to be Paid at Source" and paid to the Collector the amount of tax shown as due thereon. In each such return it is affirmed under oath in behalf of the taxpayer that the items and accounts therein reported constitute "a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to non-resident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments," during the calendar year in respect of which such return was prepared. In none of such returns was any report made or tax paid in respect of any interest ac-
116 crued in favor of the Fort Frances Company upon unpaid balances for newsprint paper supplied by the Fort

Frances Company to the Paper Company as aforesaid and nowhere upon such return did the name of the Fort Frances Company appear.

(n) On October 4, 1932, the Deputy Collector for the District of Minnesota, under the provisions of Section 3176 of the Revised Statutes, prepared and forwarded to the Commissioner a delinquent withholding-tax return for the Paper Company, then in receivership under an order of this Court, reporting $164,525.98 as income paid by the Minnesota and Ontario Paper Company to Fort Frances Pulp and Paper Company, Ltd., during the year 1921. The Commissioner determined withholding tax and penalty and interest in respect thereof in the respective amounts of $16,452.60 tax, $4,113.15 penalty, and $10,556.14 interest. The Commissioner assessed against the said Paper Company the total amount of $31,121.89 on his July 10, 1933 assessment list for the District of Minnesota. Prior to said date neither the Commissioner nor any one else acting or purporting to act in behalf of the United States made any assessment or issued any notice of deficiency as respects or entered upon any proceedings to collect any withholding taxes claimed to be owed by the Paper Company by reason of said interest credit of $164,525.98.

XVI.

(a) Between July 7, 1933, and July 13, 1933, after execution of the agreement referred to in paragraph XIV
117 above, the Commissioner prepared a certificate of overassessment bearing the number 2011190 for the year 1922 in the amount of $49,318.77, a certificate of overassessment bearing the number 2014278 for the year 1923 in the amount of $29,427.69, a certificate of overassessment bearing the number 2030102 for the year 1924 in the amount of $80,450.55, and a certificate of overassessment bearing the number 2029738 for the year 1925 in the amount of $12,193.99. On July 13, 1933, the Commissioner approved a schedule of overassessments on which appeared the aforesaid overassessments, and transmitted the same, together with the foregoing certificates of overassessment, to the Collector for his action in accordance with the instructions appearing on said schedule.

(b) On July 20, 1933, the Collector signed the schedule of overassessments and certified that the overassessments for the years 1922 to 1925, inclusive, were adjusted as follows:

1. The overassessment of $49,318.77 for the year 1922 was determined to be an overpayment and was credited in the

amounts of $42,884.00 and $6,434.77 against the additional income taxes assessed against th Paper Company for the years 1926 and 1927, respectively, and referred to in Sections X and XI above. Interest of $24,034.76 computed upon said overpayment of $49,318.77 was credited against the outstanding and unpaid withholding taxes assessed against the Paper Company for the year 1921 referred to in Section XV (n) above.

2. The overassessment of $29,427.69 for the year 1923 was determined to be an overpayment and was credited against the additional income taxes assessed against the Paper Company for the year 1927, referred to in Section XI above. Of the interest of $12,142.75 computed upon
118 said overpayment of $29,427.69 for the year 1923, $1,235.69 was credited against the outstanding and unpaid withholding taxes assessed against the Paper Company for the year 1921, referred to in Section XV (n) above, and the remainder of such interest in the amount of $10,907.06 was credited against withholding taxes assessed against the Paper Company for the years 1930 and 1931.

3. Of the overassessment of $80,450.55 determined by the Commissioner for the year 1924, the amount of $56,546.32 was abated and the balance, $23,904.23. was determined to be an overpayment and was credited in the respective amounts of $11,582.66 and $12,321.57 against the additional income taxes assessed against the Paper Company for the years 1927 and 1928 and referred to in Sections XI and XII above. Of the interest of $8,521.94 computed upon said overpayment of $23,904.23 for the year 1924, $3,038.92 was credited against the withholding taxes assessed against the Paper Company for the year 1921, referred to in Section XV (n) above, and the remainder of such interest in the amount of $5,483.02 was credited against withholding taxes assessed against the Paper Company for the years 1930 and 1931.

4. Of the overassessment of $12,193.99 determined by the Commissioner for the year 1925, the amount of $4,393.99 was abated and the balance, $7,800.00, was determined to be an overpayment. Of such overpayment, $5,851.44 was credited against outstanding and unpaid withholding taxes assessed by the Commissioner against the Paper Company for the years 1930 and 1931, and the remainder of such overpayment in the amount of $1,948.56 was credited against the additional income taxes assessed by the Commissioner against the Paper Company for the year 1928 and referred to in Section XII above. The interest computed upon said overpayment of $7,800.00 in the amount of $2,501.09 was credited against

the outstanding withholding taxes assessed against the Paper Company for the year 1921, referred to in Section XV (n) above.

(c) The interest computed upon the overpayments for 1922 to 1925, inclusive, was credited as set out in subparagraph (b) above rather than as shown on the certificates
119 of overassessment referred to in subparagraph (a) above.

XVII.

On August 16, 1933, the Commissioner, through the Collector, delivered to the Paper Company the certificates of overassessment referred to in subparagraph XVI (a) above.

On August 31, 1933, the Commissioner mailed to the Paper Company two letters. Said letters referred, among other things, to the claims for refund filed for the years 1922 to 1925, inclusive, as aforesaid. By said letters the Paper Company was notified that said claims for refund "were disallowed to the extent indicated" in the certificates of overassessment referred to in Section XVI (a) above.

XVIII.

The amounts of overassessments and taxes determined by the Commissioner in the certificates of overassessment referred to in Section XVI (a) above are the amounts of taxes assessed for the years 1922, 1923, 1924, and 1925, respectively, in excess of the tax liability for each of those years mutually agreed upon in the agreement referred to in Section XIV above.

The amounts of the overassessments were determined on the basis of grounds for refund specified in the claims for refund filed as aforesaid for the years 1922 to 1925, inclusive.

120 The Court makes the following

Conclusions Of Law.

1. This proceeding is a proceeding brought for the recovery of overpayments of internal-revenue taxes for each of the years 1922 to 1925, inclusive, and 1928, together with interest on such overpayments from the respective dates of payment thereof.

2. This Court has jurisdiction of the proceeding and of the whole thereof.

3. Claims for refund of such overpayments were filed in the manner and within the time therefor prescribed by the statutes relating thereto.

4. The agreement referred to in Section XIV of the foregoing findings of fact is a closing agreement entered into under and pursuant to the provisions of Section 606 of the Revenue Act of 1928. By said agreement it was and is conclusively determined and established, as respects this proceeding and the parties hereto, and the Court so concludes, that for each of the years 1922 to 1925, inclusive, the Paper Company paid income taxes to the Collector in behalf of itself and affiliates in excess of the amount legally due and owing, the amount of such excess for each of said years being as follows:

Year	Amount of Overpayment
1922	$49,318.77
1923	29,427.69
1924	23,904.23
1925	7,800.00

121 The amounts of said overpayments were determined in said closing agreement on the basis of grounds for refund specified in the claims for refund filed for the years 1922 to 1925, inclusive.

5. The claims for refund for the years 1922 to 1925, inclusive, were disallowed and rejected on August 31, 1933. The claim for refund for the year 1928 was disallowed and rejected July 13, 1933.

6. This proceeding was commenced within the period permitted by law for that purpose.

7. The grounds on which recovery of overpayments is sought in this proceeding for each of the years 1922 to 1925, inclusive, and 1928 were specified as grounds for refund in said claims for refund filed in respect of each of said years.

8. The amount of $791,200.51 paid to the Collector on March 22, 1926, as part of the total payment of $3,044,810.77 that day made to the Collector was and is at least in part interest, and if any portion thereof was penalty, such portion does not exceed the sum of $112,680.51. The Paper Company was and is entitled under Section 234 (a) (1) and (2) of the Revenue Act of 1926 to have said amount of $791,200.51 deducted from gross income for the purpose of determining taxable net income for the year 1926. Disallowance by the Commissioner of the deduction of $790,355.20 of said amount

of $791,200.51 was and is without authority and contrary to law.

122 9. The Paper Company and its affiliates were and are entitled to have their consolidated taxable net income for the year 1927 reduced by reason of any net loss sustained in the year 1926, all in accordance with the statutes in such case made and provided.

10. The Paper Company and its affiliates were and are entitled to have their consolidated taxable net income for the year 1928 reduced by reason of any net loss sustained in the year 1926 which was not absorbed by the consolidated taxable net income in the year 1927 as a result of the deduction of said amount of $790,355.20 from gross income for the purpose of determining taxable net income for the year 1926, all in accordance with the statutes in such case made and provided.

11. (a) The Paper Company and its affiliates sustained a consolidated net loss for the year 1926 in the amount of $541,722.10, which amount is apportionable according to law as follows:

Paper Company	$304,476.89
International Lumber Company	151,528.37
Minnesota, Dakota & Western Railway Company	15,676.35
Rainy River Improvement Company	18,450.73
Minnesota Forest Products Co.	51,589.76
Total	$541,722.10

(b) The Paper Company and its affiliates realized a consolidated net income for the year 1927 in the amount of $288,630.69, which amount is apportionable according to law as follows:

Paper Company	$275,442.33
Falls Lumber & Coal Company	13,188.36
	$288,630.69

123 After carrying forward the net losses sustained in respect of the year 1926 in the manner required by law, the taxable net income realized for the year 1927 by the Paper Company and its affiliates is the amount of $13,188.36, which amount was realized by Falls Lumber and Coal Company.

(c) The Paper Company and its affiliates realized a consolidated net income for the year 1928 in the amount of $187,094.55, which amount is apportionable according to law as follows:

Paper Company	$152,743.30
Minnesota, Dakota & Western Railway Company	23,692.22
Falls Lumber & Coal Company	10,659.03
Total	$187,094.55

After carrying forward, in the manner required by law, the balance of the net losses sustained in respect of the year 1926 and not absorbed by taxable net income realized in the year 1927, the taxable net income realized for the year 1928 by the Paper Company and its affiliates is the amount of $142,383.64, which amount was realized by the Paper Company and its affiliates as follows:

Paper Company	$123,708.74
Minnesota, Dakota & Western Railway Company	8,015.87
Falls Lumber & Coal Company	10,659.03
	$142,383.64

(d) No part of the assessment of $53,106.00 made by the Commissioner on October 31, 1931, in respect of the year 1926 was lawfully due or owing.

(e) Of the assessment of $60,894.56 made by the Commissioner on October 31, 1931, in respect of the year 1927, no part thereof was lawfully due or owing except the
124 amount of $1,510.43 plus interest thereon from March 15, 1928, to October 31, 1931. Said amount of $1,510.43 is calculated as follows:

Net income of Paper Company		$275,442.33
Net loss of Paper Company for 1926	$304,476.89	
Amount of said net loss allowable in 1927		275,442.33
Taxable net income of Paper Company		$ 0.00
Net income of Falls Lumber and Coal Company		13,188.36
Consolidated taxable net income		$ 13,188.36
Less exemption granted by Section 236 (b) of the Revenue Act of 1926		2,000.00
Consolidated taxable net income subject to tax		$ 11,188.36

Tax thereon at 13½%		1,510.43
Tax paid for 1927		0.00
Tax owing for 1927		$ 1,510.43

(f) The whole of the sum of $7,758.58 plus $518.34 interest thereon paid by the Paper Company on April 29, 1930, in respect of the year 1928 was lawfully due and owing, and no part thereof is legally refundable to the Paper Company or to the plaintiffs.

Of the assessment of $48,813.23 made by the Commissioner on October 31, 1931, in respect of the year 1928, no part thereof was lawfully due or owing except the amount of $9,327.85 plus interest thereon from March 15, 1929, to October 31, 1931. Said amount of $9,327.46 is calculated as follows:

Net income of Paper Company		$152,743.30
Less net loss of Paper Company for 1926 not absorbed in 1927		29,034.56
Taxable net income of Paper Company		$123,708.74
125 Net income of Minnesota, Dakota & Western Ry. Co.	$23,692.22	
Less net loss of said company for 1926 not absorbed in 1927	15,676.35	
Taxable net income of said company		8,015.87
Taxable net income of Falls Lumber & Coal Company		10,659.03
Consolidated taxable net income		$142,383.64
Tax thereon at 12%		$ 17,086.04
Less tax paid		7,758.58
Tax owing for 1928		$ 9,327.46

12. To the extent that the overpayments for the years 1922 to 1925, inclusive, and accumulated interest thereon were applied by the Commissioner as credits against the deficiency claimed by the Commissioner to be owing and unpaid for the year 1926, and to the extent that such overpayments and accumulated interest thereon were applied by the Commissioner as credits against the deficiencies claimed by the Commissioner to be owing and unpaid for the years 1927 and 1928 in excess of the amounts lawfully due and

owing for said years, as hereinbefore set forth, such applications and such credits were and are wholly wrongful and contrary to law, and such credits were and are void and of no effect.

13. The $164,525.98 accrued for the year 1921 in favor of the Fort Frances Company as interest owing by the Paper Company on open account by reason of newsprint paper purchased from the former by the latter was not and is not income derived from a source within the United States.

14. No part of said amount of $164,525.98 was paid
126 to the Fort Frances Company by the Paper Company until in the year 1927, and even if said amount constituted income derived from sources within the United States, there was no obligation on the Paper Company in 1921 or at any time prior to such payment to deduct or withhold any portion of said amount or to report and pay the same to the Collector or the United States as a withholding tax.

15. During the year 1921, the Paper Company, the Power Company, and the Fort Frances Company constituted and were engaged in related trades and businesses owned or controlled directly or indirectly by the same interests within the meaning of Section 240 (d) of the Revenue Act of 1921.

16. To the extent that accumulated interest on the overpayments for the years 1922 to 1925, inclusive, was applied by the Commissioner as credits against the deficiency of $31,121.89 in withholding taxes claimed by the Commissioner to be owing and unpaid for the year 1921, such application and such credits were and are wholly wrongful and contrary to law, and such credits were and are void and of no effect.

17. The plaintiffs are entitled to judgment for the recovery and refund of the following amounts:

(a) $15,909.39 paid on June 15, 1923, together with interest on said amount to October 31, 1931 (less, however, the sum of $1,839.15, being the total of the amount of $1,510.43 lawfully due and owing as additional tax for the year 1927 and of the amount of $328.72 interest thereon from March 15, 1928, to October 31, 1931), and together with interest on $14,070.24 (being the difference between said amounts of $15,909.39 and $1,839.15) from and after October 31, 1931;

127 (b) $16,704.70 paid on September 15, 1923, together with interest on said amount to October 31, 1931 (less, however, the sum of $10,797.75, being the total of the amount

of $9,327.46 lawfully due and owing as additional tax for the year 1928 and of the amount of $1,470.29 interest thereon from March 15, 1929, to October 31, 1931), and together with interest on $5,906.95 (being the difference between said amounts of $16,704.70 and $10,797.75) from and after October 31, 1931;

(c) $16,704.68 paid on December 15, 1923, together with interest on said amount from and after said date;

(d) $29,427.69 of the amount of $41,588.22 paid on December 14, 1924, together with interest on said $29,427.69 to July 10, 1933 (less, however, the sum of $22,241.52, being the amount lawfully due and owing as withholding taxes for the years 1930 and 1931 credited by the Commissioner on July 10, 1933), and together with interest on $7,186.17 (being the difference between said amounts of $29,427.69 and $22,241.52) from and after July 10, 1933;

(e) $6,172.50 of the amount of $17,731.74 paid on September 14, 1925, together with interest on said $6,172.50 from and after said date.

(f) $17,731.73 paid on December 14, 1925, together with interest on said amount from and after said date;

(g) $7,800.00 of the amount of $9,365.77 of the amount of $10,000 paid on March 13, 1926, together with interest on said $7,800.00 from and after said date.

Interest on said amounts is to be computed in accordance with the statutes in such cases made and provided, particularly Section 614 (a) (1) of the Revenue Act of 1928 and Section 177 (b) of the Judicial Code as amended by Section 615 (a) of the Revenue Act of 1928. In addition the plaintiffs are entitled to recover their costs and disbursements herein.

128 Let judgment be entered accordingly. An exception is allowed to the defendant.

Dated this 25th day of February, 1937.

GUNNAR H. NORDBYE,
United States District Judge.

---

129 Memorandum.

Plaintiffs bring this action seeking to recover the admitted overpayment of the 1922 to 1925 taxes. It appears that, within the period allowed by statute, a claim for refund

was filed, and after negotiations a closing agreement was entered into between the plaintiffs and the Commissioner wherein the correct amount of the taxes for these years was determined. Defendant asserts that by reason of the application of the overpayments, as disclosed by the certificates of overassessment, to an alleged deficiency for the years 1926 to 1928, there has been no denial of plaintiff's claim for refund, and that if plaintiffs have a right of action, or if the complaint states a cause of action, it must be construed as one wherein plaintiffs seek recovery of the overpayment by credit of the 1926 to 1928 taxes. Further, that no claim for refund has been filed for such years, and therefore this Court has no jurisdiction.

It may be noted at the outset that plaintiffs' proof of the overpayment is entirely dependent upon the closing agreement. The agreement, by reason of the statute, is binding upon all parties in absence of fraud or misstatement of material fact. The defendant does not seek to attack the validity or binding effect of the agreement, but takes the position that the Collector was not a party thereto, and hence an action thereon cannot be maintained against him. It is recognized that the Collector is not in office; that the amount involved exceeds $10,000; and that in order to maintain this action, it must be one that could have been brought against the Collector. However, it seems clear that the closing agreement constitutes a binding admission on the part of the Government that the Collector exacted an overpayment from the taxpayer in the first instance. If the closing agreement binds the Government, it necessarily must bind the Collector through whom the Government received the overpayment. It may be noted that the plaintiffs are not basing any rights upon the certificates of overassessment, except as such documents may indicate the computations of the Commissioner and the application of the overpayments, nor do the plaintiffs seek to proceed on an account stated. The closing agreement is in no way identified with the certificates of overassessment, except that such agreement formed the basis for the issuance of the certificates. Section 606 of the Revenue Act of 1928 was passed to facilitate the adjustment of tax claims. The taxes in question were paid to the Collector. He is chargeable with the erroneous collection of any excess taxes that were paid to him in his official capacity. The closing agreement is binding upon him and takes the place of the proof that is ordinarily required by the tax payer in proving affirmatively the facts and circumstances in support of the overpayment. In other words, the closing agreement constitutes an admission that, from the very nature

130

thereof, must be binding upon the Collector. He is estopped to deny its legal effect. The Court has been cited to no authority that holds that a closing agreement which acknowledges an overpayment is not binding on the Collector
131 who wrongfully collected such overpayment from the taxpayer, and it would seem that the clear intendment of the statute supports the plaintiffs in their position herein that this action could have been instituted against the Collector if he were in office.

It is conceded that the statute makes it mandatory on the Commissioner to apply an overpayment to any deficiency that may exist in any other tax year, and it is further recognized that the application of the 1922 to 1925 overpayment was made upon an alleged deficiency for the years 1926 to 1928. However, it is plaintiffs' position that such action in refusing to return the admitted overpayments is equivalent to a denial of the claim for refund filed for the years in question, so the question arises whether or not the crediting of an overpayment on an alleged deficiency constitutes a rejection of the admitted overpayment for which a claim had been filed.

The authorities are quite uniform in holding that the action of a Commissioner in attempting to credit overpayments on assessments that are barred by the statute of limitations is in effect a rejection of the claim for refund filed for the year of the admitted overpayment. Pratt & Whitney Co. vs. United States, 6 F. Supp. 574 (Ct. Cl.); Moses vs. United States, 61 F. (2d) 791 (C.C.A. 2); Jelke Co. vs. Smietanka, 86 F. (2d) (C.C.A. 7). In the latter case, the court stated (p. 473):

132 "The effect of the action of the Commissioner was to decide that no money should be repaid or refunded to appellant. Whether the Commissioner arbitrarily and wrongfully retained the funds, or whether he improperly applied them as a credit, seems to us immaterial. The intent of Congress evidently was to make the action of the Commissioner in refusing repayment the starting point from which the right to begin suits should run. It matters not how erroneously the Commissioner's action may have been, or that his refusal to refund was based upon a misconception of what should be done with the money in question. Rather, it is a question of what was the legal effect of his action. We believe that when he signed the schedules of credits and refunds the inevitable effect of his action was an adjudication that no part of the money claimed for refund should be repaid. It was to all intent and purposes a disallowance of the claim for refund, and appellant, if he

sought to test the validity of such action, was bound to begin his suit within two years from that date."

It is urged, however, by the defendant that a Commissioner has no authority to apply admitted overpayments upon a barred assessment, and that such application is illegal, and it therefore seeks to distinguish between the legal effect of such an application and the mandatory compliance with the statute. But the fact that it is mandatory on the Commissioner to apply the credit on any deficiency that he or the Collector may determine to exist, should not bar the taxpayer from asserting the right that his claim for refund has been denied. In filing their claim, the plaintiffs have requested a return of the overpayment. They did not request that the overpayment be allowed, and then credited to other taxes that were claimed to be due. The refusal to return the refund in cash to the taxpayer is just as effective a denial as if the claim had been disallowed in toto. The fact that
133 the overpayment has been credited upon an alleged deficiency may properly be assigned as a reason why the tax was not refunded, and if the application upon the alleged deficiency was warranted by law, then, of course, there is an absolute defense to any action that may be brought to recover the overpayment; but the refusal to return the overpayment remains. If, for instance, a claim for refund was filed and no decision was made by the Commissioner within the six months' period, then the claimant, under the statute, could bring suit. Certainly, if suit were brought under these circumstances, a defense that the taxpayer's position was correct, but that the overpayment had been applied to a deficiency of another year, would not justify a dismissal of the action. The mere asserted defense would not dispose of plaintiff's cause of action and require him to drop his suit and file a claim for refund for the years to which the credit had been applied. Such a defense would simply constitute a reason why the overpayment had not been returned, and if the application was lawful, such a defense would dispose of the merits of the controversy.

There is no decision that specifically recognizes the application of an admitted overpayment upon a non-barred deficiency as a denial of a taxpayer's claim, so as to constitute a condition precedent to the commencement of an action. But, by analogy, it would seem that the reported cases
134 which hold that an application to a barred assessment constitutes a denial, would support the plaintiffs' position that the application herein likewise constitutes a denial of the claim. The purpose of filing a claim is to acquaint the officials of the Government with the reasons and circum-

stances in support of the taxpayer's contention that there has been an overpayment. It is undoubtedly required in order to expedite the handling of tax claim refunds so that the Government will not be overwhelmed with a large number of unnecessary suits. It must be recognized that the Government has a right to provide for certain restrictions and limitations upon the right of any citizen to commence suit against it. One of these restrictions in tax matters is the lodging of a claim for refund within a certain specified time after the payment of the tax. This condition the taxpayer herein has performed. It is conceded that its position is correct with reference to the overpayment for the years 1922 to 1925, but the Government refuses to return the money because it contends that there is an underpayment for other specified years. To obtain a refund of taxes might prove to be an endless procedure if the Government's position is to be sustained. In the instant case, if the taxpayer had filed a claim for the overpayment of the 1926 to 1928 taxes, treating the credit applied as an overpayment, then the Government, before that suit came to trial, could interpose a defense that the tax-
135 payer's position was well taken, but that the overpayment by credit was applied to another year where a deficiency existed. The Government is not prejudiced by treating the refusal to return the overpayment in cash as a denial of plaintiffs' claim so as to warrant the bringing of this action. Characterizing the failure to return the admitted overpayment for the years in question as a denial of the claim, will prevent circuitous proceedings and needless litigation. The deductibility of the so-called penalty interest item can be determined in this suit just as effectively, and with the same recognition of the rights of the defendant, as would exist if the question arose in a suit to recover the alleged erroneous credit. It is difficult to perceive any substantial distinction between an application of an overpayment to a barred deficiency, and the application of an overpayment to a deficiency which did not in fact exist. In either event, the action of the Commissioner was improper. In either case, it would be incumbent upon the Court to determine the legality of the Commissioner's act in applying the overpayment; to a barred deficiency in one instance and a non-deficiency in the other. The legal effect of applying the overpayment as a credit on a claimed deficiency would be the same as the application upon a barred deficiency. In
136 both instances, such application is tantamount to a denial of the taxpayer's claim for refund.

In passing it may be observed that the fact that the amount of taxes due for the years 1926 to 1928 was also

agreed upon at the conference between the Commissioner and the Paper Company, subject to the one question of the deductibility of $790,355.20, should not militate against the taxpayer's right to consider the application of the overpayment to the alleged deficiency for the years 1926 to 1928 as a denial of its claim for refund. It cannot be urged that the participation in the closing agreement by the taxpayer in any way constituted a waiver of its right to proceed to recover the overpayment in the 1922 to 1925 taxes. The taxpayer did not agree that such overpayment might be applied to any apparent deficiency in other years, nor did it commit itself to any particular procedure to be followed in the litigation of the deductibility of the $790,355.20 item. Further, it must be evident that, in attacking plaintiffs' right to proceed to recover the 1922 to 1925 overpayment, the Government cannot claim any prejudice by reason of any of the recitals in the closing agreement, nor by reason of anything
137 that may have been stated to the Court in charge of the trusteeship when authority was given to the plaintiffs to enter into the agreement. After the agreement had been signed and approved, the plaintiffs were free to proceed in any manner consistent with their rights under the statute.

Defendant urges that there can be no recovery of the overpayment for the year 1922 for another reason. It appears that the Paper Company had commenced an action against the Collector for recovery of the overpayment of the 1922 taxes prior to the so-called closing agreement. As one of the convenants of this closing agreement, it is provided that this action was to be dismissed with prejudice, and such a dismissal was filed. The Government now takes the position that the action having been dismissed with prejudice, the plaintiffs are estopped to bring any subsequent action against the Collector, or, in this instance, against the United States, for the 1922 overpayment. However, such dismissal should not be construed as a bar to plaintiffs' right of recovery of the admitted overpayment for that year. There is no showing that the parties intended anything more than to preclude the taxpayer from asserting in another action the al-
138 leged grounds of overpayment for that year, or to relitigate the amount thereof. When the Government acknowledged the overpayment for that year in its closing agreement, and thereby conceded that it owed a certain sum of money to the taxpayer, it is hardly in a position to assert that, with one hand it acknowledges the amount due, but with the other, it would bar the plaintiffs from recovering the overpayment. The sensible and rational construction of the action of the parties should be deemed to be an

intent to dismiss with prejudice the action pending, and to leave the taxpayer in a position comparable to that which would exist in the event an action were brought on an unliquidated claim and a dismissal with prejudice was obtained in consideration of a debtor's making delivery to a creditor of a promissory note for the amount agreed upon. A suit on the note under such circumstances would not be affected by the prior dismissal with prejudice.

Contention is made that the statute of limitations bars the action. However, Section 3226, the statute referred to by the defendant, was amended by Section 1103 of the Revenue Act of 1932. By that amendment, the only requirement is that suit must be brought within two years from the date of mailing of the notice of disallowance. These claims
139 were disallowed either in July or August, 1933; the exact date is not material because the suit was instituted in August, 1934.

Contention is further made that the plaintiffs' action cannot be sustained because they seek to recover interest as a part of the refund, which they assert was recognized and allowed by the Commissioner in the closing agreement. It appears that substantial interest was allowed on the overpayment. The defendant contends that the Collector is not responsible for interest. However, Section 177 of the Judicial Code was amended so as to provide for the recovery of interest on refunded taxes whether the judgment would be against the United States or the Collector, from the date of overpayment to a date preceding the date of refund by not more than thirty days. This statute governs the rights of the parties herein, and reads as follows (45 Stat. 791, Section 615 of the Revenue Act of 1928):

"(a) Section 177 of the Judicial Code, as amended, is amended to read as follows:

"Sec. 177. (a) No interest shall be allowed on any claim up to the time of the rendition of judgment by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest, except as provided in subdivision (b).

"(b) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall

be allowed at the rate of 6 per centum per annum upon
140 the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue.

"(b) Subsection (a) of this section shall take effect on the expiration of thirty days after the enactment of this Act."

The cases of French Clay Blending Co. vs. Lewellyn (D. C. Pa.) 26 F. (2d) 744, and Penn Smokeless Coal Co. vs. Lewellyn, (D. C. Pa.) 26 F. (2d) 743, were decided before this amendment.

Defendant urges that the complaint should be construed as an action in which recovery is sought for the overpayment of taxes for the years 1926 to 1928 by credit, and urges that, by reason of the fact that no claim for refund has been filed for such years, the action should be dismissed. If the action must be construed as one seeking to recover the overpayment by credit on the taxes for these years, then admittedly there is no jurisdiction because the taxpayer did not file a claim for refund for such years. The complaint does set forth in considerable detail the various incidents that occurred prior to the closing agreement, and also makes reference to the directions for the application of the overpayment. It may be that some of the recitals should be disregarded as mere surplusage, but a reasonable construction of the bill of complaint amply warrants the view that it states a cause of action for the recovery of the 1922 to 1925 overpay-
141 ment.

If, therefore, the Court has jurisdiction of this action, the next question to be determined is whether or not the plaintiffs have established that there was no deficiency, or a less deficiency for the years 1926 to 1928 than that which was computed by the Commissioner. The question must be determined in light of the facts and circumstances surrounding the interest or penalty item of $790,355.20, which the taxpayer was required to pay by reason of the underpayment of the taxes for the years 1917 to 1920, inclusive. It appears that there was litigation between the taxpayer and the Government regarding the amount of the tax due for these years. The Commissioner had assessed additional taxes for the year 1917 on the consolidated income of the Paper Company and its affiliates. It appears that $759,838.91 was assessed as additional taxes for the year 1917, and $884,665.66 as additional taxes for the year 1918. Claims for abatement were rejected

by the Commissioner, and later the Commissioner notified the Paper Company and its affiliates of his determination of deficiencies of $613,248.82 and $1,403,435.47 in taxes upon the consolidated income of the Paper Company and its affiliates for the years 1919 and 1920, respectively. On February 21, 1925, the Paper Company and its affiliates filed petitions with the United States Board of Tax Appeals for redetermination of the additional taxes assessed for 1917 and 1918, and on March 19, 1925, it filed petitions with the Board for re-
142 determination of the deficiencies determined for the years 1919 and 1920. While these proceedings were pending, conferences were held between the taxpayer and the Commissioner, and on February 25, 1926, a stipulation was entered into wherein the deficiencies for the taxable years 1917 to 1920, inclusive, were determined and agreed upon.

The Revenue Act of 1918 provided that where understatement of the amount of taxable income was due to negligence, the recovery should be the principal amount with five per cent of the total amount of the deficiency, plus interest at the rate of one per cent per month on the amount of the deficiency. This law was applicable to the years in question, except 1917. Pursuant to the stipulations, separate orders were entered determining the amount of taxes for the years 1917 and 1918, and a third order covered the years 1919 and 1920. These orders were made by the Board in pursuance of the stipulation that was entered into by the Commissioner and the taxpayer. The underpayment for the year 1917 was determined to be $489,533.40; 1918, $351,943.48; 1919, $491,360.53; and 1920, $920,772.85. In addition to the principal amounts, which were compromised by the parties, the item of penalty or interest was also compromised. Instead of computing the penalty at five per cent on the deficiency, with interest at the rate of one per cent per month, the amount was com-
143 puted at the rate of six per cent per annum for all the years, including 1917. For that year the so-called penalty was computed to be $227,633.03; for the year 1918, $139,897.55; for the year 1919, $165,834.17; and for the year 1920, $255,514.46; totalling $788,879.21. It also appears that the Commissioner added two items of interest, to-wit, $807.71 for the year 1919, and $1,513.59 for the year 1920, totalling $2,321.30. These items apparently were computed under Section 283 (d) of the Revenue Act of 1926 as further interest. The taxpayer paid to the Collector on March 22, 1926, the sum of $3,044,810.77, which is the total of the deficiency for the years mentioned, including the penalty interest amounts, and $2,321.30, the additional interest added by the Commissioner.

The taxpayer endeavored to deduct the so-called penalty and interest from the 1926 consolidated tax return as a deductible item. The Commissioner refused to allow this deduction, contending that it was exclusively a penalty and that penalties were not deductible as expenses in the computation of one's income tax return. Accordingly, the Commissioner disallowed not only the sum of $788,879.21, but also the sum of $1,475.99 of the interest item heretofore referred to as the additional interest of $2,321.30, so the total disallowance was the sum of $790,355.20. It is this item that the parties referred to in their closing agreement in 1933; that is, everything was determined for all of the past years, except
144 the deductibility of the so-called penalty or interest item, and, as before stated, if the Court has jurisdiction, the deductibility of this item constitutes the gist of the lawsuit. It may be noted that after the payment of this tax in the amount of $3,044,810.77, the company sought to set aside this stipulation of settlement and repudiated the validity thereof. Its petition, however, was denied. See, Backus, et al. vs. United States, (Ct. Cl.) 59 F. (2d) 242.

It is significant to note that, in the settlement agreement between the Commissioner and the taxpayer when the 1917 to 1920 taxes were compromised, it was specifically stated that the underpayment for those years was due to negligence on the part of the taxpayer, but without intent to defraud. It may further be observed that this item was referred to in the Board's order on the stipulation as a penalty, but such characterization was undoubtedly taken from the stipulation itself wherein the parties used the same term. But the nature of this item was not before the Board for determination, and when the petition was made to the Court of Claims to set aside the settlement, the question as to whether or not this addition was penalty or interest was not before that court. Consequently, any reference that may have been made either in the Board's order or in the decision of the Court of Claims with reference to the character of the six
145 per cent per annum addition, is not controlling, nor is it of any probative value in the determination of that issue herein. In the computation made by the parties, Exhibit G, attached to the stipulation herein, on the basis of which the Board's orders were entered, the sheet relating to the six per cent per annum is entitled in part "Penalty Interest on Tax Deficiency," below which appears a sub-heading "Date from which interest runs and amount of principal." It has been recognized that the addition of five per cent to the amount of the deficiency is a penalty, but the imposition of the one per cent per month has been held to be

true interest. Citing U. S. vs. Childs, 266 U. S. 304; U. S. vs. Guest, 143 F. 456; Carnill vs. Lederer, 24 F. (2d) 447; In re Simon, 80 F. (2d) 81.

The Solicitor of Internal Revenue has clearly indicated his views as to interest on underpayments in the published rulings of the department. In O. 922, 2 Cumulative Bulletin, 227, this opinion appears:

"Interest paid under the provisions of Section 250 is interest within the meaning of Sections 214 (a) 2 and 234 (a) 2, notwithstanding that it is added to the amount of the tax. Had it been intended that interest paid or accrued on income tax should be excluded from deductions, such exception would have been set forth specifically in Section 214 (a) 2 and 234 (a) 2, as was done in the case of interest on indebtedness incurred or continued to purchase or carry obligations (other than obligations of the United States issued after Sept. 24, 1917), the interest upon which is wholly exempt from taxation under the income tax * * *. It is held, therefore, that interest paid or accrued under the provisions of Section 250
146 Revenue Act of 1918 is deductible under the provisions of Section 214 (a) 2 or Section 234 (a) 2 in computing net income."

The section referred to in that opinion, to wit, Section 234 (a) 2, Revenue Act of 1926, permits the deduction of "all interest paid or accrued within the taxable year on its indebtedness" in computing the net income tax of a corporation. It would seem uncontrovertible that, if the parties in their stipulation had made their computation as interest on the basis of one per cent a month on the deficiency, such amount would be deductible as "interest paid or accrued," and, clearly, if the parties had computed only six per cent per annum on the deficiency as interest, there would not be much question as to the deductibility of such sum. The difficulty arises, if any exists, by reason of the apparent compromise of the penalty provision of five per cent and the one per cent per month interest item, and the characterization of such compromise percentage by the parties as a penalty, and in some instances as interest. The term or terms used by the parties in the stipulation, however, are not controlling, and we are not fully informed as to the details of the negotiations, the factors that prompted the wording of the stipulation, or the reasons for the acquiescence on the part of the Government in the marked reduction of the interest and penalty permitted by the statute. It may be assumed that a taxpayer is generally more concerned in the amount of interest and penalty than the terms that may be used to characterize the retri-

bution that it must pay for its negligence. The five per
147 cent penalty prescribed by the statute is generally not so onerous a burden as the more euphemistic provision of "interest" which is computed at the high rate of one per cent a month. It may be doubted that this interest provision is actually compensatory interest. The stipulation of the parties, therefore, and the language used therein, while not necessarily controlling as to the exact nature of the six per cent per annum addition, might incline one to the opinion that, by the use of the term "penalty", the parties intentionally designated it as such. On the other hand, the manner in which it was computed, the fact that it was less than the statutory interest of one per cent a month, and the further fact that it was computed on the 1917 deficiency, to which the statute in question did not apply, would more convincingly sustain the view that the parties concluded that, by reason of all the facts and circumstances, a strict application of the statute with reference to penalty and interest was not justified, and that a six per cent addition to the agreed deficiency should constitute the taxpayer's fair share of the penalty and interest items. In that the statute only called for a flat five per cent penalty computed on the deficiency, where negligence and not fraud is involved, it would obviously be unfair to determine that the entire so-called penalty interest of six per cent as computed herein, should be deemed a penalty, as dis-
tinguished from the interest, or as distinguished from
148 a sum representing both penalty and interest. The entire picture strongly indicates a compromise of both penalty and interest, rather than an arbitrary penalty of six per cent per annum, which was not directed or authorized by the statute. It would seem that the parties lumped penalties and interest into one item in order to arrive at an agreement, and the exact proportion thereof that should be interest, as distinguished from penalty, was not determined.

However, the Government strenuously urges that the entire sum of $790,355.20 should be considered as penalty, and contends that as such it is not deductible. In support of its position it relies upon the cases of Great Northern Railway Co. vs. Commissioner, 40 F. (2d) 372; Burroughs Building Material Co. vs. Commissioner, 47 F. (2d) 178; Chicago Rock Island and Pacific Railway Co. vs. Commissioner, 47 F. (2d) 990. But a reading of these cases does not justify the view that all penalties are non-deductible "as ordinary and necessary expense paid or incurred during the taxable year in carrying on any trade or business." The cases cited deal primarily with penalties sought to be deducted which consisted of fines paid for violation of criminal statutes. These

courts incline to the opinion that the fines being of this nature, no deduction should be allowed for the reason that such a holding would be contrary to public policy. It was
149 reasoned that it would hardly be consonant with public policy to recognize such expense as ordinary and necessary incidents of one's business. The penalties, however, provided by the Internal Revenue laws for failure to pay one's tax when it is due may arise when the taxpayer, by reason of want of funds, for instance, is only a few days late with the payment. Certainly, one cannot say that, merely because a penalty has been imposed under the provisions referred to herein, the recognition of such penalties as deductible items in computing one's income tax would in any way violate public policy. It is difficult to discern any close analogy between negligence in the computation of one's income tax and the violation of the penal statutes of the state or nation. It is common knowledge that error in the computation of taxes occurs with such frequency that few business concerns can be assured that their tax returns are free from error. Mistakes of law or fact are not unusual in making up an income tax statement, especially where a consolidated return is made involving a number of affiliated companies. Certainly, negligent computation of one's taxes is not extraordinary. Generally, it is recognized by the cases that expense arising on account of negligence is a deductible item, in that it fairly arises as an ordinary and necessary expense of transacting one's business. An agent may be negligent in the operation of an automobile. Compensatory dam-
150 ages may result. Such expense is deductible in the computation of one's income tax. Anderson vs. Commissioner, 81 F. (2d) 457. The services of an auditor in computing one's income tax is an ordinary and necessary expense. Why, then, should not the proximate result of the errors and omissions of such auditor be deemed an ordinary and necessary expense within the statute. In the instant case, it appears that in the conference of settlement there arose differences of opinion as to more than three hundred items. No connivance is charged on the part of any official or employee of the taxpayer. It is conceded that in making the returns the taxpayer acted in good faith. That there were many complex and intricate questions of income tax law is evident. The fact that consolidated returns were made with a number of affiliated companies enhanced the probability of error. It may be true that no hard and fast rule can be enunciated that will apply to every situation where deductibility of a so-called penalty is concerned. There may be penalties which cannot fairly be characterized as "necessary and ordinary expense," while under different circumstances the penalty

will permit such characterization. There is no showing herein that the errors and mistakes which give rise to this large deficiency arose in any other way than that which is the common experience of many large concerns. The mere fact that the deficiency represents a large sum should not, in
151 and of itself, justify the conclusion that the negligence involved was of any different character than that which usually arises whenever an underpayment occurs. The Commissioner did not insist upon the complete retribution which the statute provides in case of negligence, and it is fair to assume that the Government at that time recognized the underpayment as an ordinary and usual misunderstanding, which so frequently arises in tax matters.

As indicative of the former view of the Department, it may be noted that in the bulletin O. 926, 1 Cumulative Bulletin 231, it was ruled that penalties imposed for negligence or delinquency in making returns of income tax may be ordinary and necessary expense legally deductible from gross income. This opinion states (p. 242):

"The question whether penalties of the character described are legal deductions from gross income is one which must be determined on the facts in a given case. These penalties may be an incident to the conduct of a business. Where by reason of the negligence of some clerk or officer of a corporation a penalty is incurred and paid, the penalty is an ordinary and necessary business expense and may legally be deducted from gross income. The same may also be true of the penalty imposed for delinquency in the filing of an individual return. Additions to tax for fraudulent returns do not constitute necessary business expenses. An individual who himself is guilty of making a fraudulent return should not be allowed to deduct the penalty which he is required to pay for making such a return."

The ruling, however, was revoked in G. C. M. 11358, XII-1 Cumulative Bulletin 29, on the theory that it was in conflict with the views set forth in Great Northern Railway
152 Co. vs. Commissioner, supra, Burroughs Building Material Co. vs. Commissioner, supra, and Chicago Rock Island & Pacific Railway Co. vs. Commissioner, supra, but, as before stated, these cases all deal with violations of penal statutes, and penalties for negligence in computing one's income tax do not come within the principles laid down in the cases referred to, nor within the reasons therefor. In commenting on these cases relied upon by the Government for the revocation of its ruling, the court in Helvering, Commissioner vs. Hampton, 79 F. (2d) 358, 359, stated:

"In all of the above tax cases the allowance of the claimed deduction is refused because it consists of a fine for violating governmental statutes or regulations or legal expenditures in defense of prosecutions for such offenses. The basis of these decisions is that the taxpayer, in offending the state or federal government, is engaged in a transaction which governmental policy forbids being considered as a part of the business. There is no analogy between payment of a fine for a public offense and the restitution by a real estate dealer of the gains made in a prior tax year by his tortious conduct in a private transaction in the course of his business."

However, it is not necessary to lay down any hard and fast rule herein which should govern the deductibility of income tax penalties that may be assessed under the statute. Presumably, each case should be determined in light of its own peculiar facts and circumstances. The record herein does not furnish any affirmative showing as to the precise manner in which the underpayment arose, nor are the details of the Paper Company's negligence made clear. But it must
153 be conceded that if the six per cent item is to be construed as true interest, rather than penalty, it is obviously deductible under the Solicitor General's ruling, and the plain intendment of the statute. If it is penalty and interest combined, the total sum being far less than the interest permitted by the statute, and it being computed as interest, that is, at the rate of six per cent per annum, the Government should not complain if the taxpayer should have the benefit of any doubt that may exist, and permit the taxpayer to deduct the entire sum as fairly coming within the purview of the statute pertaining to interest, and/or as an ordinary and necessary expense incurred in carrying on the business. The generally accepted principle which recognizes the necessity of resolving doubts against the Government and in favor of the taxpayer in construing taxing acts, is salutary and may well be applied to the instant situation. In any event, the Government is not in a position to contend that the entire sum of $790,355.20 is non-deductible. It must be conceded that of the sum of $790,355.20, the sum of $1,475.99 is true interest and clearly deductible. As stated before, there is no possible justification for the characterization of the entire six per cent as penalty. If any part is to be considered as penalty, it should be limited to the portion thereof that is equal to five per cent of the admitted deficiency. The balance should be considered as interest. It may be considered equitable to settle the dispute in
154 this manner; that is, limit the deduction to the difference between five per cent of the underpayment and

the total penalty interest charge. However, such a disposition would be based upon an arbitrary computation, and there is no showing that adequately indicates what part, if any, of the addition to the underpayment was intended to represent the five per cent penalty. Furthermore, such a determination would recognize an intent of the parties to assess a penalty on the 1917 deficiency in absence of any statute authorizing such exaction. Where the Government has consented to a computation of an interest penalty charge on an underpayment which is less than the amount of interest that might be demanded under the statute, and which computation does not purport to separate the interest and penalty items, in absence of bad faith or fraud, and where it is conceded that the under payment arose by reason of negligence, it cannot be contrary or repugnant to public policy if the entire sum is characterized as a deductible item for income tax purposes.

The remaining question to be determined pertains to the application of some $30,810.46 interest on the overpayment for the years 1922 to 1925 to the withholding tax claimed to be due from the Paper Company on account of interest credits accruing on its books during the year 1921 and paid in 1927 to the Fort Frances Company, a Canadian corporation. That is, the withholding tax was assessed against the Paper Company for the year 1921, although no moneys were paid
155 to the Fort Frances Company until 1927. It is conceded that the agreement for the purchase of the paper from the Fort Frances Company was consummated in Canada, and was wholly performed outside of the United States. The paper was delivered in Canada at the mill, and all freight charges and transportation expense from the mill to the consumers were paid by the Paper Company. In fact, every branch of the transaction was completed within the confines of Canada. The interest accruals on these balances due the Fort Frances Company were entered on the books of the taxpayer in its Minneapolis office, but the 1921 interest was not entered until 1927, during which year it was paid to the Canadian corporation. The Government contends that in in paying the interest to a foreign corporation, the Paper Company should have deducted the statutory tax of thirteen and one-half per cent, and it is to this withholding tax alleged to be due from it in the year 1921 that a portion of the interest on the overpayment of the taxes in 1922 to 1925 was applied. Among the reasons asserted by the plaintiffs why the Government erred in crediting such interest overpayments upon the withholding tax for the year 1921 are the following:

(1) That during the years 1921 to 1927, inclusive, the Fort Frances Company had an office in the United States, and hence the withholding tax statute was not applicable to it.

(2) That the interest entered for the year 1921 and paid in 1927 to the Canadian Company did not constitute income derived from a source within the United States.

(3) That the withholding tax is barred by the statute of limitations.

156 (4) That the taxpayer was under no legal liability to withhold any tax for the year 1921 because no sums were paid to the Fort Frances Company in that year; that there can be no withholding tax until the moneys were actually paid, which did not occur until 1927; and that the crediting of the interest on overpayments upon the alleged 1921 withholding tax was without legal justification.

The statute upon which the Government relies reads in part as follows:

Revenue Act of 1926, 44 Stat. 9, Approved Feb. 26, 1926, Section 221 (a):

"All persons • • • having the control, receipt, custody, disposal, or payment of interest (except interest on deposits with persons carrying on the banking business paid to persons not engaged in business in the United States and not having an office or place of business therein) • • • and income, of any non-resident alien individual, or of any partnership not engaged in trade or business within the United States and not having any office or place of business therein, • • • shall • • • deduct and withhold from such annual or periodic gains, profits, and income, a tax equal to five per centum thereof; • • •."

Section 237. "In the case of foreign corporations subject to taxation under this title not engaged in trade or business within the United States and not having any office or place of business therein, there shall be deducted and withheld at the source in the same manner and upon the same items of income as is provided in Section 221, a tax equal to twelve and one-half per centum thereof in respect of all payments of income made before the enactment of this Act, and equal to thirteen and one-half per centum thereof in respect to all payments of income made after the enactment of this Act, and such tax shall be returned and paid in the same manner and subject to the same conditions as provided in that section; • • •."

It is admitted that during the years in question, Fort Frances Company had an office in the City of Minneapolis. Its books and records were here, including the ledgers,
157 cash books, vouchers, voucher register, journals, checks, receipts, etc., and it occupied space in the general office of the Paper Company. It did not, however, pay any rent directly to the landlord, but was charged a proportional rental by the Paper Company, to which it paid its share of the rent. It appears that during this period some six to eight persons were employed in the Minneapolis office by the Fort Frances Company, and two or three of these persons were bookkeepers devoting all of their time to the matters of the Canadian Company. During these years the general control and supervision of the manufacturing operations of the company have been exercised in its Minneapolis office. Further, it appears that all sales, all receipts, and all disbursements are recorded in the books that were kept here, and since 1923 on the company's printed stationery, "Minneapolis" has been given as its address. In this city it sent and received its correspondence, including official notices received from, and correspondence with, representatives of the dominion and local governments in Canada. The company's Canadian income tax returns have been prepared in the Minneapolis office, and were checked here by the Canadian tax officials. It further appears that the officers of the Fort Frances Company resided in Minneapolis and made their headquarters in the Minneapolis office. All corporate
158 and directors' meetings were likewise held in the Minneapolis office. The fact that the office was located in the same general quarters which housed the parent company should not militate against the taxpayer's contention that the Canadian company had a bona fide office in the City of Minneapolis. During the latter portion of this period, the name of the company not only appeared upon the main entrance to the offices, but its name and office address were listed in the Minneapolis City Directory.

The Government urges that in order to come within the exceptions of the statute, it must appear that not only does the foreign corporation have an office or place of business in the United States, but that it is engaged in trade or business in this country. It seeks to interpret the language of the statute as if it were written "engaged in business in the United States and having an office or place of business therein." It ignores the word "not" and omits the same from the sentence, thus converting the negative phrase of the statute into affirmative language, and yet it retains the conjunction "and". In other words, the Government argues

that the withholding tax applies unless the foreign corporation not only was doing business in the United States, but also had an office or place of business therein.

The statute does not enlighten us as to the legislative intent, and, under such circumstances, it is generally
159 recognized that the popular and common understanding of the phrases used is to be considered, and in applying the ordinary and rational construction to the language of the statute, it would appear that Congress intended that there should be no obligation to withhold the tax if the foreign corporation was engaged in trade or business within the United States or if it had an office or place of business therein. It is conceded that the Fort Frances Company was not engaged in trade or business in the United States within the meaning of such terms, but it is not seriously contended that it did not have an office or place of business therein. It is worthy of note that the position of the taxpayer herein has heretofore received the approval of the Treasury Department in its interpretation of the language in question. In the regulations issued under the Revenue Act of 1918 (Regulation 45, Article 363) it was stated:

"The income of * * * resident foreign corporations is free from a withholding tax."

In Section 1509 of the same regulations, the following explanation of the meaning of the phrase "resident foreign corporations" appears:

"A foreign corporation engaged in trade or business within the United States or having an office or place of business therein is sometimes referred to in the regulations as a resident foreign corporation, and a foreign corporation not engaged in trade or business within the United States and not having any office or place of business therein as a non-resident foreign corporation."

It was further provided in Article 601 of Regulation
160 45 that withholding is required "with respect to payments to foreign corporations not engaged in trade or business within the United States and not having any office or place of business therein." It does not appear that the Government has departed from this construction in any subsequent regulation. It may be argued that Congress intended to require withholding of any moneys paid to a foreign corporation in all cases where the tax applies, unless the foreign corporation was doing business in the United States and had an office therein, in order to afford the Government some security in the collection of the tax directly from such foreign

corporation. Assuming that such construction would provide more assurance that the foreign corporation would, under the circumstances, have property in the United States from which the tax could be collected, which conclusion does not necessarily follow, there is no way in which the Court could adopt such construction without doing violence to the ordinary, common and popular interpretation of the language used. It is not disputed that the Paper Company acted in good faith in making the payment to the Fort Frances Company, and there is no contention that there was any fraudulent intent on its part. Giving effect, therefore, to the plain intendment of the language used, it would seem that the Paper Company construed this statute as any reasonable, prudent person would have interpreted it under the same circumstances.

161 This same statute has been repeatedly reenacted by Congress over a period of years, and the identical language has been retained. The Treasury Department itself has continuously adhered to the construction above referred to. One cannot say that the statute is obscure or ambiguous, and, under these circumstances, the Court should not depart from a literal construction thereof.

But even though it is held that the position now urged by the Government with respect to the construction of the statute should be upheld, it is the Court's opinion that the interest paid to the Fort Frances Company was not interest from sources within the United States. The right to the payment for the products sold arose in Canada and never had a situs in the United States. It must be remembered that we are considering a single transaction. The right to interest arose by reason of the failure of the Paper Company to pay the principal when it was due. The entry of interest in the books was not a separate transaction, but merely a record of that which necessarily accrued from the sale in Canada. The entry of interest on the books of the Paper Company did not create, nor did it give rise to the right of interest. The interest was merely an incident to a transaction that arose and which was consummated wholly outside of the United States. Assume, for instance, that an American concern borrows money in Canada from a Canadian institution at an agreed rate of interest, and that the entire transaction was consummated in Canada. Was it the intent of Congress that

162 interest paid by the American concern from its offices in this country on such a transaction should be subject to the thirteen and one-half per cent tax. It seems reasonably clear that the "interest-bearing obligations" referred to in Section 217 (a) (1) are such as have a source within the United States. The interest due on the balances that re-

mained from time to time on the purchase price of paper products became an integral part of that transaction, and it cannot be said that the sale was consummated wholly without the United States, but that the interest on the balances due arose from sources within the United States. The section of the statute read in conjunction and in light of the other provisions of the statute, does not support the Government's position, and the Court is of the opinion that on the admitted facts there was no obligation on the part of the taxpayer to withhold any tax from the moneys so paid.

In support of its position, defendant relies principally on Eitingon vs. Commissioner, 27 B. T. A. 1341; Helvering vs. Stockholms Enskilda Bank, 293 U. S. 84; and British-American Tobacco Co. vs. Helvering, 293 U. S. 95. A reading of the Eitingon Case does not substantiate defendant's construction. It will be observed that the decision specifically makes reference to the fact that "there is no showing that the transaction out of which the obligation for interest arose was consummated outside of the United States." Neither
Helvering vs. Stockholms Enskilda Bank, supra, nor
163 British-American Tobacco Co. vs. Helvering, supra,
involved the question as to whether the interest under consideration was derived from sources without or within the United States. The principal question which concerned the court was whether the tax refund due from the Government was an interest-bearing obligation. These cases are authority for the view that the account between the Paper Company and the Canadian company in the instant case is an interest-bearing obligation within the meaning of the statute, but these cases in no way bear on the right of the Government to tax interest paid on such an obligation where it indisputedly appears that the transaction which gave rise to the account was consummated entirely without the United States.

The statute of limitations is asserted as a bar to the right of the Government to recover any withholding tax if the same constitutes a valid claim against the taxpayer under the statute. It appears that on March 15, 1922, the taxpayer filed with the Collector a return of moneys paid to foreign corporations and individuals on Form 1042 for the year 1921, which is the year the interest accrued. The entry and payment, however, were not made until 1927. Manifestly, in the return made on March 15, 1922, no report could have been made, or was made, of any sum paid to the Fort Frances Company because no moneys were paid until some five years later. Whether the filing of the return in the year 1922 on

Form 1042 is sufficient to begin the statute of limita-
164 tions, the Court does not now determine, because it must be apparent that there was no obligation to withhold any tax until the money was paid. No money was paid in 1921, and hence no withholding tax could be assessed against the debtor for that year. It is evident, therefore, that if for no other reason the action of the Commissioner in attempting to credit a portion of the overpayment interest upon an alleged withholding tax for the year 1921 was without justification and without any basis under existing statutes.

The determination of the consolidated net income for the years 1926 and 1928 has been determined by the Commissioner. To give effect to the allowance of the deduction of the sum of $790,355.20 and the rule that should be followed in making such deduction, the Court has adopted the principles enunciated in the case of Swift & Co. vs. United States, 38 F. (2d) 365. The computation follows:

165 Consolidated Net Income for Year 1926 as Determined by Commissioner of Internal Revenue and as Adjusted to Give Effect to Allowance of Deduction of $790,355.20

Companies Sustaining Net Losses:

		Percentage to Total
Minnesota and Ontario Paper Company		
Net Income Determined by Commissioner	$462,609.08	
Less further deduction allowable	790,355.20	
Balance Net Loss of M & O Paper Co.	$327,746.12	56.20837
International Lumber Company	163,108.72	27.97161
Minnesota, Dakota & Western Ry. Co.	16,874.38	2.89379
Rainy River Improvement Company	19,860.81	3.40694
Minnesota Forest Products Company	55,532.44	9.52329
Total Net Losses	583,122.47	100.00000
Less Net Income of Falls Lumber & Coal Co.	41,400.37	
Leaving Consolidated Net Loss for 1926 of	$541,722.10	

The net income of Falls Lumber & Coal Company is apportioned to companies sustaining net losses on the basis of the percentages above indicated, as follows:

	Net Loss as Adjusted	Less Portion of Net Income of Falls Lbr. & Coal Co.	Balance to be carried forward to Year 1927
Minnesota and Ontario Paper Company	$327,746.12	$23,269.23	$304,476.89
International Lbr. Co.	163,108.72	11,580.35	151,528.37
Minnesota, Dakota & Western Railway Co.	16,874.38	1,198.03	15,676.35
Rainy River Improvement Co.	19,860.81	1,410.08	18,450.73
Minnesota Forest Products Co.	55,532.44	3,942.68	51,589.76
	$583,122.47	$41,400.37	$541,722.10

The losses shown in the last column as to each company are deductible from the net income in 1927 of the same company, and to the extent that the net income for 1927 is insufficient to absorb such net loss, the excess is carried forward to 1928.

166 Application of Net Loss Sustained in 1926 to Consolidated Net Income in 1927

		Percentage to Total	Less Share of 1927 Losses	Balance Net Income for 1927
Net Income:				
Minn. & Ontario Paper Co.	$678,568.62	95.4307	$403,126.29	$275,442.33
Falls Lumber & Coal Co.	32,490.43	4.5693	19,302.07	13,188.36
Total Net Income	$711,059.05	100.0000	$422,428.36	$288,630.69
Less Net Losses:				
International Lumber Co.	312,502.11			
Minnesota, D. & W. Ry. Co.	36,222.37			
Rainy River Improvement Co.	20,519.49			
Minnesota Forest Products Co.	53,184.39			
	422,428.36			
Consolidated Net Income	$288,630.69			

Consolidated Taxable Net Income and Tax for 1927

Net Income of Paper Company		$275,442.33
Net Loss of Paper Company for 1926	$304,476.89	
Amount of said net loss allowable in 1927		275,442.33
Taxable net income of Paper Company		$ 0.00
Net Income of Falls Lumber and Coal Company		13,188.36
Consolidated taxable net income		$ 13,188.36
Less exemption granted by Section 236 (b) of the Revenue Act of 1926		2,000.00
Consolidated taxable net income subject to tax		$ 11,188.36
Tax thereon at 13½%		1,510.43
Tax paid for 1927		
Tax owing for 1927		0.00
		$ 1,510.43

167 Application of Balance of Net Loss Sustained in 1926 to Consolidated Net Income for Year 1928.

		Percentage to Total	Less Share of 1926 Losses	Balance Net Income for 1928
Net Income:				
Minnesota & Ontario Paper Co.	$314,796.00	81.63963	$162,052.70	$152,743.30
Minnesota, Dakota & Western Ry. Co.	48,828.43	12.66326	25,136.21	23,692.22
Falls Lumber & Coal Co.	21,967.71	5.69714	11,308.68	10,659.03
Total Net Income	$385,592.14	100.00000	$198,497.59	$187,094.55
Less Net Losses:				
Int. Lbr. Co.	130,016.31			
Rainy River Improvement Co.	14,719.76			
Minnesota Forest Products Co.	53,761.52			
	198,497.59			
Consolidated Net Income	$187,094.55			

Consolidated Taxable Net Income and Tax 1928

Net Income of Paper Company		$152,743.30
Less net loss of Paper Company for 1926 not absorbed in 1927		29,034.56
Taxable Net Income of Paper Company		$123,708.74
Net Income of Minnesota, Dakota & Western Ry. Co.	$23,692.22	
Less net loss of said company for 1926 not absorbed in 1927	15,676.35	
Taxable Net Income of said company		8,015.87
Taxable Net Income of Falls Lumber and Coal Company		10,659.03
Consolidated taxable Net Income		$142,383.64
Tax thereon at 12%		$ 17,086.04
Less tax paid		7,758.58
Tax owing for 1928		$ 9,327.46

168 Let this memorandum be made a part of the foregoing findings of fact and conclusions of law.

GUNNAR H. NORDBYE,
United States District Judge.

(Endorsed): Filed February 25, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

169 (Judgment, April 9, 1937.)

In the District Court of the United States in and for the District of Minnesota—Fourth Division.

Term Minutes.

March Term, A. D. 1937.

April 9, 1937.

Friday morning,

Court opened pursuant to adjournment,

Present: Honorable Gunnar H. Nordbye, Judge.

Margaret L. Mullane, Clerk.
By Thomas H. Howard, Chief Deputy.

(Before Nordbye, J.)

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. Law.
United States of America, Defendant.

This cause having come on for trial by the Court without a jury on the 4th day of May, 1936, trial by jury having been duly waived, and the Court having heard the evidence and the arguments of counsel and considered the same, and having made and on the 25th day of February, 1937, filed its findings of fact and conclusions of law, and having ordered judgment for the plaintiffs;

Now, therefore, pursuant to said findings of fact and conclusions of law and order for judgment, and on motion of Messrs. J. B. Faegre and Hayner N. Larson, attorneys for the plaintiffs:

It Is Considered Ordered And Adjudged: that said plaintiffs, C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor do have and recover of and from

said defendant, United States of America, the sum of One Hundred Six Thousand Eight Hundred Forty-eight and 42/100 Dollars ($106,848.42), together with interest as follows:

On $14,070.24 from and after October 31, 1931,
On $ 5,906.95 from and after October 31, 1931,
On $16,704.68 from and after December 15, 1923,
On $ 7,186.17 from and after July 10, 1933,
On $ 6,172.50 from and after September 14, 1925,
On $17,731.73 from and after December 14, 1925,
On $ 7,800.00 from and after March 13, 1926;

said interest to run and accrue until a date not more than thirty days prior to the date of payment to the plaintiffs as provided by Section 614 (a) of the Revenue Act of 1928, without costs and disbursements which have been expressly waived by said plaintiffs.

Further Ordered: That all further proceedings herein, be and they are hereby stayed for a period of forty-two (42) days from and after this date, for such further proceedings as the Defendant may be advised to take under the provisions of Rule XXI of this Court.

---

170 Bill of Exceptions.

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer as Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. Law.
United States of America, Defendant.

Be it remembered that on the 4th day of May, 1936, at ten o'clock A. M., the above-entitled case came on for trial before the Honorable Gunnar H. Nordbye, one of the judges of the above-named court, at the Federal Building, in the City of Minneapolis, Minnesota.

Messrs. Cobb, Hoke, Benson, Krause & Faegre, by Messrs. J. B. Faegre and Hayner N. Larson, appeared for the plaintiffs; Messrs. George F. Sullivan, United States Attorney, Linus J. Hammond, Assistant United States Attorney, and Messrs. J. E. Garvey, Special Assistant to the Attorney General, and Arthur Carnduff, Special Attorney for the Bureau of Internal Revenue, appeared for the defendant.

The above case coming on for hearing, the following proceedings were had.

Mr. Larson: At the outset, we would like, in behalf of the plaintiff, to ask leave of the Court to amend the petition as respects the last sentence of paragraph B of Section 16 and we have prepared a formal motion to that effect to-
171 gether with a formal order. I may say that in the following case, the claim in Consolidated Proceedings 11640, the answer of the trustees makes the allegation which is sought to be incorporated in the petition in Law 3391.

Mr. Garvey: If it please the Court, and with the permission of the Court, the defendant at this time desires to have permission to make and file a motion to dismiss.

The Court: Well, is this directed now to this motion for leave to amend?

Mr. Garvey: I have in mind that it is directed to the whole proceedings before the Court, before any action is taken by the Court in the case, on the ground that the Court is without jurisdiction to at this time inquire into anything but the fact of its jurisdiction to entertain this case.

The Court: Very well. Does that raise substantially the same questions that I have already passed upon?

Mr. Garvey: We have raised also the question of the statute of limitations with reference to the claimed overpayment of taxes for 1922 to 1925 inclusive.

The Court: Do I understand that you have no particular objection to the offer of this amendment, except that you do so without waiving your motion that you now desire to make?

Mr. Garvey: My attention has not been directed to the motion until just this moment, and my reaction to this now is that it is an attempt to supply a statement of a cause of action, not heretofore, in the pleadings; no cause of action was stated, and it is now attempted to be covered by this motion to amend.

The Court: Well, do you want to be heard now upon the motion that the plaintiff makes with reference to amendment of its bill?

Mr. Garvey: Well, I have in mind, your Honor—

The Court: I would like to take up one thing at a time. Is there any reason why we cannot hear now and determine the propriety of allowing this amendment?

172 Mr. Garvey: I have in mind this thought, your Honor, that the defendant having raised the question of jurisdiction, that that would precede the consideration of anything else in the case.

The Court: All right, I will hear you.

Mr. Garvey: May the defendant have your permission to file the motion at this time.

The Court: Very well.

Thereupon, the defendant filed in Court its Motion to Dismiss, which, omitting caption, was in words and figures as follows:

173 Motion to Dismiss.

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota & Ontario Paper Company, a Corporation, Plaintiffs,
No. 3,391. vs. At Law.
United States of America, Defendant.

For the reason that this Court does not have and should not take jurisdiction thereof, the defendant, the United States, makes and files this motion to dismiss the following purported causes of action, purported to be alleged in plaintiff's petition and on the following grounds:

(1) The Purported Cause Of Action For The Recovery Of Claimed Overpayment Of Income Taxes For The Years 1922 To 1925, Inclusive.

The allegations of the petition show that the amount of said claimed overpayments were repaid to the plaintiffs, prior to the commencement of this action, by the application of said claimed overpayments on tax assessments outstanding against the taxpayer for other tax years; the allegations of the petition further show that suit for the recovery of claimed overpayments of income taxes for the said years 1922 to 1925 inclusive, was barred prior to the commencement of this action; said allegations further show that at the time of the commencement of this action, suit could not have been maintained, for the recovery of the said claimed overpayments, against the Collector, if he were in office; said allegations further show that the claimed overpayment are in excess of $10,000 for each of said years and that this court does not have jurisdiction of said purported cause of action.

174 (2) The Purported Cause of Action for the Recovery, as Interest or as a Claimed Overpayment of Withholding Tax, of the Amount of Interest Allowed by the Commissioner on Overpayments of Income Taxes for the Years 1922 to 1925 Inclusive and Credited on Withholding Tax Assessed for the Year 1921.

The allegations of the petition show that the 1921 withholding tax assessment was collected by the crediting thereon of interest allowed by the Commissioner on allowed overpayments of income taxes for the years 1922 to 1925, inclusive; the allegations aforesaid do not show that any claim for refund was filed with the Commissioner for a refund of the amount so collected on the withholding tax assessment aforesaid; the allegations further show that at the time of the commencement of this action a suit could not have been maintained against the Collector, if he were in office, because a Collector is not liable to suit for interest on claimed overpayments of tax and because, further, no claim for refund for claimed overpayment of said withholding tax was filed with the Commissioner.

(3) The Purported Cause of Action for the Recovery of Claimed Overpayment by Credit of Income Taxes Assessed for the Years 1926, 1927 and 1928.

The allegations of the petition that purport to set out said purported cause of action for the recovery of claimed overpayment by credit of income taxes for the years 1926 to 1928, inclusive, do not allege that any claims for refund were filed with the Commissioner for refund of any part of the amounts collected by credit on the assessments for said years; said allegations show that this court does not have jurisdiction of the said purported cause of action for recovery of claimed overpayments, by credit, of taxes for the said years 1926 to 1928, because no claims for refund are alleged to have been filed with the Commissioner for refund, and because, further, a Collector of Internal Revenue is not liable to suit for
175 taxes collected by credit, and the taxes so collected by credit for each of said years is in excess of $10,000.00.

Respectfully submitted,

GEORGE F. SULLIVAN,
United States Attorney.

JOHN E. GARVEY,
Special Assistant to the Attorney General.

176 The Court: I will hear you now.

(Arguments of counsel.)

The Court: Well, it seems to me that you are urging substantially the same reasons and grounds that were submitted to the Court at the time that the demurrer was considered by the Court, and the Court having overruled the demurrer, the Court will deny the motion at this time with the understanding that of course the question of jurisdiction is always before the Court, and when the matter is finally submitted, if counsel desires to again urge the lack of jurisdiction, I think it is a matter that the Court will ultimately have to pass upon.

Mr. Garvey: At this time may we have an exception to the ruling of the Court?

The Court: Yes, it may be noted, and the record may indicate that counsel may have an exception to all adverse rulings that may be made, without specifically taking an exception in the record, and that exception may be noted with the same force and effect as if it were specifically taken after each and every adverse ruling. I will allow the amendment to the complaint.

By such amendment the last sentence of paragraph b of Section XVI of the plaintiffs' petition was amended so as to read as follows:

"At no time has the Fort Frances Company maintained a sales representative in the United States, but during all the times herein mentioned it has maintained and still does maintain an office in the United States."

Mr. Garvey: You have allowed the motion to amend the complaint, and an exception to the allowance of the amendment to the pleading may be noted, your Honor?

The Court: Yes.

Mr. Larson: If the Court please, most of the facts in this case have been incorporated in a written stipulation signed by the counsel for the respective parties under date of April 30, 1936, and we will file that stipulation with the Court.

The Court: Very well. (Paper handed to the Court by Mr. Larson.)

177 Mr. Larson: I call the Court's particular attention to the opening paragraph of the stipulation which reads as follows:

(First paragraph of stipulation read to the Court by Mr. Larson.)

Mr. Garvey: If the Court please, assuming that the stipulation has now been offered but not as yet received in evidence, the defendant at this time objects to the admission of any evidence in this case on the ground that the Court does not have jurisdiction of any purported cause of action set out in the petition, and on the further ground that the petition does not state facts sufficient to constitute a cause of action, and in connection with this objection we desire to have the record show that we are asserting all of the objections that are set forth in the motion to dismiss heretofore filed.

The Court: The Court will overrule the objection and the stipulation may be received in evidence.

The stipulation so received in evidence, omitting caption, was in words and figures as follows:

178 (Stipulation of Facts.)

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer as Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. At Law.
United States of America, Defendant.

It is hereby stipulated and agreed that the matters herein set out shall be treated by the Court and the parties as true and established, subject, however, to the reserved right of both parties to object to the same on the ground of immateriality, irrelevancy, or as not within the issues, and subject also to the reserved right of the defendant to object to the jurisdiction of the Court over any and all causes of action purported to be alleged in plaintiffs' complaint and subject also to the reserved right of the defendant to object to the admission of any evidence in the case on the ground that the complaint does not state facts constituting a cause of action; and subject also to the reserved right of both parties to offer testimony or evidence in respect to other or further facts not inconsistent with the matters herein stipulated as true and established:

I.

a. Minnesota and Ontario Paper Company is a corporation organized and existing under the laws of the State of Maine. It is hereinafter referred to as the Paper Company.

b. Fort Frances Pulp and Paper Company, Limited, is a corporation organized and existing under the laws of the

Province of Ontario, Canada. It is hereinafter referred to as the Fort Frances Company.

c. Ontario and Minnesota Power Company, Limited, is a corporation organized and existing under the laws of
179 the Province of Ontario, Canada. It is hereinafter referred to as the Power Company.

II.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer now are and at all times since September 29, 1934, have been, pursuant to an order of this Court that day made and entered under Section 77B of the Bankruptcy Act, the duly appointed, qualified and acting trustees of the estate of the Paper Company, debtor. Between July 11, 1934, and said September 29, 1934, C. T. Jaffray and R. H. M. Robinson, pursuant to an order of this Court made and entered under said Act on July 11, 1934, were the duly appointed, qualified, and acting temporary trustees of the estate of the Paper Company, debtor. From November 30, 1931, until their appointment as such temporary trustees on July 11, 1934, Jaffray and Robinson were the duly appointed, qualified, and acting receivers of the Paper Company.

III.

From 1917 to 1920, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with the following corporations: International Lumber Company, Rainy River Improvement Company, Minnesota, Dakota and Western Railway Company, Falls Lumber and Coal Company, Watrous Island Boom Company, and International Insulation Company. From 1921 to 1925, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with all said named corporations except International Insulation Company. From 1926 to 1928, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with all said named corporations together with Minnesota Forest Products Company, a corporation. The corporations affiliated with the Paper Company are sometimes herein referred to as "affiliates".

180 During each of said three periods the annual earnings or net income of the Paper Company and its affiliates were consolidated for income-tax purposes. All taxes paid on such consolidated earnings or net income have been paid by the Paper Company.

IV.

All income taxes paid by the Paper Company to the United States for the years 1922 to 1925, inclusive, were paid to one Levi M. Willcuts as the duly appointed, qualified, and acting Collector of Internal Revenue for the District of Minnesota. Willcuts was such Collector from June 1, 1921, to July 31, 1933, inclusive. Since the latter date he has not been and is not now in office as Collector of Internal Revenue.

Whenever in this stipulation the word "Collector" is used, reference is made to said Willcuts as Collector of Internal Revenue for the District of Minnesota.

V.

a. On March 14, 1923, the Paper Company filed with the Collector a tentative return of consolidated net income of itself and affiliates for 1922 and at the time of such filing paid to the Collector $17,500 in part payment of the estimated tax. On June 15, 1923, the Paper Company filed with the Collector a completed return of the 1922 consolidated net income of itself and affiliates. Said completed return showed a tax of $66,818.77, which amount, except for the payment of $17,500 already made, was paid to the Collector as follows:

June 15, 1923	$15,909.39
September 15, 1923	16,704.70
December 15, 1923	16,704.68

b. On June 4, 1927, the Paper Company filed with the Collector a claim for refund of the $66,818.77 paid to him as income tax for 1922. On April 30, 1929, a further claim for refund of said tax was filed with the Collector.

181 c. On or about the 30th day of September, 1930, the Paper Company filed in the United States District Court for the District of Minnesota, Third Division, an action in which the Paper Company was plaintiff and the Collector defendant. In said action the Paper Company sought judgment against the Collector for the amount of income taxes claimed to have been overpaid for the year 1922 as aforesaid. A copy of the petition in said action is hereto attached and made a part hereof and marked Exhibit A. The Collector made and filed an answer, a copy of which is hereto attached as Exhibit B and by reference is made a part hereof. Said action was pending at the time of the making of the closing agreement, Exhibit O, hereinafter referred to.

VI.

a. On March 15, 1924, the Paper Company filed with the Collector a tentative return of consolidated net income of

itself and affiliates for 1923 and at the time of such filing paid to the Collector $58,000 in part payment of the estimated tax. On June 14, 1924, the Paper Company filed with the Collector a completed return of the 1923 consolidated net income of itself and affiliates. Said completed return showed a tax of $166,352.88, which amount, except for the payment of $58,000 already made, was paid to the Collector as follows:

June 14, 1924	$25,175.44
September 14, 1924,	41,588.22
December 14, 1924	41,588.22

b. On July 20, 1927, the Paper Company filed with the Collector a claim for refund of $110,241.81 of the income taxes paid to him for 1923. On or about December 10, 1928, a further claim for refund was filed with the Collector wherein the amount of the 1923 income taxes claimed as refundable was reduced to $86,355.86. On April 30, 1929, a second further claim for refund was filed with the Collector wherein refund was again claimed of said $86,355.86.

182

VII.

a. On March 14, 1925, the Paper Company filed with the Collector a tentative return of consolidated net income of itself and affiliates for 1924 and at the time of such filing paid to the Collector $15,000 in part payment of the estimated tax. On June 15, 1925, the Paper Company filed with the Collector a completed return of the 1924 consolidated net income of itself and affiliates. Said completed return showed a tax of $70,926.94, which amount, except for the payment of $15,000 already made, was paid to the Collector as follows:

June 15, 1925	$20,463.47
September 14, 1925	17,731.74
December 14, 1925	17,731.73

b. On December 24, 1927, the Paper Company filed with the Collector a claim for refund of $36,904.69 of the income taxes paid to him for 1924. On March 13, 1929, the Paper Company filed with the Collector a further claim for refund wherein the amount of the 1924 taxes claimed as refundable was reduced to $29,882.76. On April 30, 1929, the Paper Company filed with the Collector a second further claim for refund wherein the amount of 1924 taxes claimed as refundable was increased to $49,670.56.

c. On December 29, 1930, the Commissioner mailed to the Paper Company a notice of the determination of a deficiency in income taxes for the year 1924, in accordance with Section 274 of the Revenue Act of 1926. Within sixty days there-

after the Paper Company filed with the Board a petition for redetermination of such deficiency. Said petition was pending before the Board at the time of the making of the closing agreement, Exhibit O, hereinafter referred to.

VIII.

a. On March 13, 1926, the Paper Company filed with the Collector a tentative return of the consolidated net income of itself and affiliates for 1925 and at the time of such filing paid to the Collector $10,000 thereon. On June 1,
183 1926, the Paper Company filed with the Collector a completed return of the 1925 consolidated net income of itself and affiliates. Said completed return showed a tax of $9,365.77, which amount was less than the sum already paid by $624.23, which last amount the Collector refunded to the Paper Company on October 23, 1926.

b. On December 24, 1927, the Paper Company filed with the Collector a claim for refund of $8,515.30 of the income tax paid to him for 1925. On March 13, 1929, the Paper Company filed with the Collector a further claim for refund wherein the amount of 1925 taxes claimed as refundable was reduced to $6,401.49. On April 30, 1929, the Paper Company filed with the Collector a second further claim for refund wherein the amount of 1925 taxes claimed as refundable was further reduced to $3,400.75.

c. On November 7, 1930, the Commissioner mailed to the Paper Company a notice of the determination of a deficiency in income taxes for the year 1925, in accordance with Section 274 of the Revenue Act of 1926. Within sixty days thereafter the Paper Company filed with the Board a petition for redetermination of such deficiency. Said petition was pending before the Board at the time of the making of the closing agreement, Exhibit O, hereinafter referred to.

IX.

a. In February, 1921, and March, 1924, the Commissioner assessed an aggregate amount of $759,838.91 as additional taxes upon the 1917 consolidated income of the Paper Company and its affiliates. In March, 1924, the Commissioner assessed $884,665.66 as additional taxes upon the 1918 consolidated income of the Paper Company and its affiliates. Claims for abatement of $498,111.21 of the 1917 assessment were rejected on February 4, 1925. A claim for abatement of the 1918 assessment was rejected January 23, 1925. On January 23, 1925, the Commissioner notified the Paper
184 Company and its affiliates of his determination of deficiencies of $613,248.82 and $1,403,435.47 in taxes up-

on the consolidated income of the Paper Company and its affiliates for 1919 and 1920 respectively. On February 21, 1925, the Paper Company and its affiliates filed petitions with the Board for redetermination of the said additional taxes assessed for 1917 and 1918. On March 19, 1925, the Paper Company and its affiliates filed petitions with the Board for redetermination of the deficiencies determined for 1919 and 1920.

b. While said proceedings were pending before the Board, the Paper Company and its affiliates held conferences with the Commissioner and other representatives of the Treasury Department for the purpose of ascertaining and agreeing upon the amount of tax owed for each of said years 1917 to 1920, inclusive. As the result of said conferences the Paper Company and the Commissioner entered into a written stipulation dated February 25, 1926. Said stipulation was filed with the Board February 26, 1926. A true copy thereof is hereto attached as Exhibit C and by reference is made a part hereof.

c. By letter dated February 25, 1926, the Commissioner advised the Paper Company as follows:

Confirming the agreement made with the Commissioner of Internal Revenue on February 24, 1926, you are advised that the amount of the penalty to be assessed against you as the result of the negligent understatement of your tax liability for the taxable years 1917, 1918, 1919, and 1920 will be compromised by accepting a sum equal to 6 per cent per annum on the amount of the deficiencies determined and assessed in accordance with the stipulation this date entered into between the taxpayer and the representative of this office, from the date the deficiencies became due and payable to the date of payment.

d. On February 26, 1926, the following further written stipulation was signed and filed with the Board:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by its attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota &
185 Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer", by its counsel, that the taxpayer's deficiency in tax for the taxable years 1917, 1918, 1919, and 1920 shall be determined by the Board of Tax Appeals in accordance with the agreement entered into between the taxpayer and the Commissioner on February 25, 1926, a copy of which is hereto attached, marked "Exhibit A", and made a part of this stipulation.

The Exhibit A attached to said stipulation is the written agreement of February 25, 1926, referred to in subparagraph (b) above.

e. On February 26, 1926, the Board entered the following order in respect of said proceedings then pending before it:

This appeal coming on to be heard on February 26, 1926, the taxpayer being represented by Ralph M. Shaw, Esq., and the Commissioner being represented by E. C. Lake, Esq., and it appearing that the parties have entered into a certain stipulation which was filed on this date, and it appearing that the parties have agreed to compute the tax in accordance with the stipulation aforesaid; Now, therefore, on agreement of counsel for both parties, it is

Ordered, That the tax shall be computed in accordance with the stipulation filed this date and referred to hereinabove. Final determination of the deficiency will be made under rule 50 of the Board's Rules of Practice on consent of the parties or on 10 days' notice by either party to the adverse party.

f. On March 6, 1926, the following further stipulation was filed with the Board in said proceedings:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer", by its counsel, that the amount of the deficiency due from the taxpayer or overassessment in the above-entitled appeals for each of the taxable years 1917, 1918, 1919 and 1920 is as follows:

	Tax	Penalty
1917, overassessment	$270,305.51	$227,633.03
1918, overassessment	532,722.18	139,897.55
1919, deficiency	491,360.53	165,834.19
1920, deficiency	920,772.85	255,514.47

186 The above overassessments for the years 1917 and 1918 arose by reason of the Commissioner's assessing against the Paper Company additional taxes of $759,838.91 for the year 1917 and $884,665.66 for the year 1918. The additional taxes agreed upon as due by the Paper Company for the years 1917 and 1918 were in the respective amounts of $489,533.40 and $351,943.48, which amounts were respectively $270,305.51 and $532,722.18 less than the respective amounts theretofore assessed for said years as set forth in subpara-

graph (a) above. There was no assessment of the amounts designated "Penalty" prior to March 8, 1926.

g. Pursuant to the stipulations filed as noted above, the Board on March 6, 1926, entered three orders determining the amount owing for each year involved. The amount owing for 1917 was covered in one order; the amount owing for 1918 was covered in another order; and the amount owing for each of the years 1919 and 1920 was covered in the third order. True copies of said orders are hereto attached as Exhibit D, Exhibit E, and Exhibit F, respectively, and by reference are made parts hereof. The "other documentary evidence" referred to in said orders is a computation prepared by representatives of the Paper Company and its affiliates and the Commissioner and filed with the Board March 6, 1926; a true copy of said computation is attached as Exhibit G and by reference is made a part hereof. Said computation was made pursuant to and in accordance with the stipulation, Exhibit C, referred to in subparagraph (b) above and the letter of the Commissioner referred to in subparagraph (c) above.

h. Thereafter on March 8, 1926, the Commissioner, in accordance with the Board's orders, Exhibits D, E, and F, assessed on his March, 1926, assessment list the amounts of the deficiencies for 1919 and 1920 and the amounts designated as "penalties" for 1917, 1918, 1919, and 1920, and issued
187 certificates of overassessment of the amounts to be abated for the years 1917 and 1918. On March 12, 1926, the Collector issued notices and made demand for each of the years as follows:

Year	Tax	Amounts called "Penalty" in Board's orders	Interest	Total
1917	$ 489,533.40	$227,633.03		$ 717,166.43
1918	351,943.48	139,897.55		491,841.03
1919	491,360.53	166,834.17	807.71	658,022.41
1920	920,772.85	256,514.46	1,513.89	1,177,800.90
Total	$2,253,610.26	$788,879.21	$2,321.30	$3,044,810.77

The total of the amounts designated as "Penalty" and of the interest is $791,200.51.

On March 22, 1926, the Paper Company paid to the Collector $3,044,810.77, the sum of the foregoing demands.

A true copy of the assessment list is hereto attached as Exhibit H, and by reference is made a part hereof.

i. On April 18, 1928, a suit was instituted in the Court of Claims against the United States for the recovery of income, war-profits, and excess-profits taxes for the years 1917 to 1920, inclusive. The decision of the Court of Claims is reported in 59 Fed. (2d) 242. Reference to said decision is hereby made.

188

X.

On June 15, 1927, the Paper Company filed with the Collector its consolidated income tax return for the year 1926 reporting thereon a consolidated net loss and no tax liability. On October 28, 1931, the Commissioner advised the Paper Company that an audit of its return disclosed a tax liability of $41,566.02, which amount, together with interest of $11,539.98, or a total of $53,106.00, was, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed on the October 31, 1931 Assessment List for the District of Minnesota. The Commissioner made a further audit of the Paper Company's return for the year 1926 and as a result thereof issued a certificate of overassessment bearing the number 1316756, a true copy of which is hereto attached as Exhibit I and by reference is made a part hereof. By said certificate $10,222.00 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed for 1926, but outstanding and unpaid as follows: income taxes, $33,565.47; interest thereon to October 31, 1931, $9,318.53; total, $42,884.00.

XI.

On June 15, 1928, the Paper Company filed with the Collector its consolidated income tax return for the year 1927 reporting a consolidated net loss and no tax liability. On the October 31, 1931 Assessment List for the District of Minnesota, the Commissioner, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed a tax for 1927 of $50,010.72, together with interest of $10,893.84, a total of $60,894.56. The Commissioner made a further audit of such return for the year 1927 and as a result thereof issued a certificate of overassessment bearing the number 1316757, a true copy of which is hereto attached as Exhibit J and by reference is made a part hereof. By said certificate $13,449.44 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed

189 for 1927 but outstanding and unpaid as follows: income taxes, $38,965.14; interest thereon to October 31, 1931, $8,479.98; total, $47,445.12.

XII.

a. On May 11, 1929, the Paper Company filed with the Collector its consolidated income tax return for the year 1928 reporting a consolidated net loss and no tax liability. The Commissioner, upon an audit of said return, determined a deficiency in tax for the said year 1928 in the sum of $7,758.58 tax and $518.34 interest thereon, and on April 26, 1930, said amount was by the Commissioner assessed against the Paper Company, and the same was paid to the Collector as set out in subparagraph (b) hereof. On the October 31, 1931 Assessment List for the District of Minnesota, the Commissioner, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed an additional tax for 1928 against the Paper Company in the amount of $42,166.52 and interest thereon of $6,646.71, which amounts, together with the previous assessment, made April 26, 1930, of $7,758.58 in taxes and $518.34 in interest thereon (which last amounts had been paid to the Collector prior to October 31, 1931, as hereinafter set out in subparagraph (b) hereof), made a total of $57,090.15. The Commissioner made a further audit of such return for the year 1928 and as a result thereof issued a certificate of overassessment bearing the number 2223612, a true copy of which is hereto attached as Exhibit K, and by reference is made a part hereof. By said certificate $34,543.10 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed for the year 1928 but outstanding and unpaid as follows: income taxes, $12,774.52; interest thereon to October 31, 1931, $1,495.61; total, $14,270.13.

b. On April 29, 1930, pursuant to a demand of the Collector, the Paper Company paid to him $7,758.58, together with interest thereon of $518.34, the additional tax and interest for the year 1928, assessed by the Commissioner on the
190 April 26, 1930 Assessment List for the District of Minnesota. On February 9, 1932, the receivers filed a claim for refund of such additional tax and interest so paid. A true copy of said claim is hereto attached as Exhibit L, and by reference is made a part hereof. The "Statement of Objections" dated January 27, 1932, to which said Exhibit L makes reference, alleged as error the disallowance by the Commissioner of the deduction for 1926 of $790,355.20 of the amount of $791,200.51 referred to in Section IX (h) above. Said claim for refund was rejected by the Commissioner and the receivers of the Paper Company notified thereof by letter dated July 13, 1933.

XIII.

In making his final determination of income tax liability for the said year 1926, the Commissioner did not allow as a deduction the item of $788,879.21 designated in the Board's orders as penalties, and did not allow as a deduction $1475.99 of the amount paid by the Paper Company as interest, all as set out in paragraph IX (h) hereof. In arriving at the total tax liability of $33,565.47 for the year 1926, the Commissioner determined a consolidated net income of $248,633.10. In arriving at the total tax liability of $38,965.14 for the year 1927, the Commissioner determined a consolidated net income of $288,630.69. In arriving at the total tax liability of $20,533.10 for the year 1928, the Commissioner determined a consolidated net income of $187,094.55. The foregoing consolidated net incomes for the years 1926, 1927, and 1928 were arrived at as to each company of the affiliated group as follows:

Year 1926

Net Income:		
Minnesota and Ontario Paper Company		$462,609.08
Falls Lumber and Coal Company		41,400.37
		$504,009.45
Less Net Losses:		
International Lumber Company	$163,108.72	
Minnesota, Dakota & Western Ry. Co.	16,874.38	
Rainy River Improvement Company	19,860.81	
Minnesota Forest Products Company	55,532.44	255,376.35
Consolidated Net Income for 1926		$248,633.10

191

Year 1927

Net Income:		
Minnesota and Ontario Paper Company		$678,568.62
Falls Lumber Company		32,490.43
		$711,059.05
Less Net Losses:		
International Lumber Company	$312,502.11	
Minnesota, Dakota & Western Ry. Co.	36,222.37	
Rainy River Improvement Co.	20,519.49	
Minnesota Forest Products Co.	53,184.39	
		422,428.36
Consolidated Net Income for 1927		$288,630.69

	Year 1928	
Net Income:		
Minnesota and Ontario Paper Company		$314,796.00
Minnesota Dakota & Western Railway Co.		48,828.43
Falls Lumber and Coal Company		21,967.71
		$385,592.14
Less Net Losses:		
International Lumber Company	$130,016.31	
Rainy River Improvement Co.	14,719.76	
Minnesota Forest Products Co.	53,761.52	
		198,497.59
Consolidated Net Income for 1928		$187,094.55

XIV.

a. On June 10, 1933, the receivers of the Paper Company filed a petition in this Court. A true copy of said petition, together with exhibits included therein, is attached as Exhibit M and by reference is made a part hereof.

b. On June 10, 1933, this Court entered its order granting the prayer of said petition. A true copy of said order, omitting exhibits included therein, is attached as Exhibit N, and by reference is made a part hereof. The exhibits included in said order are identical with those included in the petition, Exhibit M.

c. On June 12, 1933, pursuant to the authorization given in the court order aforesaid, the Paper Company and its affiliates executed, and on July 7, 1933, the Commissioner executed, with the approval of the Secretary of the Treasury on the same day given, an agreement entered into under and in pursuance of Section 606 of the Revenue Act of 1928. A true
192 copy of said agreement is hereto attached as Exhibit O, and by reference is made a part hereof.

d. On August 1, 1933, the action referred to in Section V (c) above, pursuant to a stipulation filed, a copy of which, omitting signatures, is included in Exhibit M, was dismissed with prejudice. On June 22, 1933, pursuant to a stipulation filed, a copy of which, omitting signatures, is included in Exhibit M, the Board entered an order in the proceeding referred to in Section VII (c) above, determining an overpayment of the Paper Company's income taxes for the year 1924 in the amount of $23,904.23. On June 22, 1933, pursuant to a stipulation filed, a copy of which, omitting signatures, is in-

cluded in Exhibit M, the Board entered an order in the proceeding referred to in Section VIII (c) above, determining an overpayment of the Paper Company's income taxes for the year 1925 in the amount of $7,800.00.

XV.

a. Between July 7, 1933, and July 13, 1933, the Commissioner prepared a certificate of overassessment for the year 1922 in the amount of $49,318.77, a certificate of overassessment for the year 1923 in the amount of $29,427.69, a certificate of overassessment for the year 1924 in the amount of $80,450.55, and a certificate of overassessment for the year 1925 in the amount of $12,193.99. True copies of said certificates of overassessment are hereto attached as Exhibits P, Q, R, and S respectively and by reference are made parts hereof. On July 13, 1933, the Commissioner approved a schedule of overassessments on which appeared the aforesaid overassessments, and transmitted the same, together with the foregoing certificates of overassessment, to the Collector for his action in accordance with the instructions appearing on said schedule.

193 A copy of the schedule of overassessments is hereto attached as Exhibit T and by reference is made a part hereof.

b. On July 20, 1933 the Collector signed the schedule of overassessments and certified that the overassessments for the years 1922 to 1925, inclusive, were adjusted as follows:

(1) The overassessment of $49,318.77 for the year 1922 was determined to be an overpayment and was credited in the amounts of $42,884.00 and $6,434.77 against the additional income taxes assessed against the Paper Company for the years 1926 and 1927, respectively, and referred to in Sections X and XI above. Interest of $24,034.76 computed upon said overpayment of $49,318.77 was credited against outstanding and unpaid withholding taxes assessed by the Commissioner against the Paper Company for the year 1921.

(2) The overassessment of $29,427.69 for the year 1923 was determined to be an overpayment and was credited against the additional income taxes assessed against the Paper Company for the year 1927, referred to in Section XI above. Of the interest of $12,142.75 computed upon said overpayment of $29,427.69 for the year 1923, $1,235.69 was credited against outstanding and unpaid withholding taxes assessed by the Commissioner against the Paper Company for the year 1921 and the remainder of such interest in the amount of $10,907.-

06 was credited against withholding taxes assessed against the Paper Company for the years 1930 and 1931.

(3) Of the overassessment of $80,450.55 determined by the Commissioner for the year 1924, the amount of $56,546.32 was abated and the balance, $23,904.23, was determined to be an overpayment and was credited in the respective amounts of $11,582.66 and $12,321.57 against the additional in-
194 come taxes assessed against the Paper Company for the years 1927 and 1928 and referred to in Sections XI and XII above. Of the interest of $8,521.94 computed upon said overpayment of $23,904.23 for the year 1924, $3,038.92 was credited against withholding taxes assessed by the Commissioner against the Paper Company for the year 1921 and the remainder of such interest in the amount of $5,483.02 was credited against withholding taxes assessed against the Paper Company for the years 1930 and 1931.

(4) Of the overassessment of $12,193.99 determined by the Commissioner for the year 1925, the amount of $4,393.99 was abated and the balance, $7,800.00, was determined to be an overpayment. Of such overpayment, $5,851.44 was credited against outstanding and unpaid withhholding taxes assessed by the Commissioner against the Paper Company for the years 1930 and 1931, and the remainder of such overpayment in the amount of $1,948.56 was credited against the additional income taxes assessed by the Commissioner against the Paper Company for the year 1928 and referred to in Section XII above. The interest computed upon said overpayment of $7,800.00 in the amount of $2,501.09 was credited against outstanding withhholding taxes assessed by the Commissioner against the Paper Company for the year 1921.

c. The interest computed upon the overpayments for 1922 to 1925, inclusive, was credited as set out in subparagraph (b) above rather than as shown on the certificates of overassessment, Exhibits P, Q, R, and S.

XVI.

On August 16, 1933, the Commissioner through the Collector delivered to the Paper Company the certificates of overassessment, Exhibits P, Q, R, and S.

195 On August 21, 1933, the Commissioner mailed to the Paper Company two letters. True copies of said letters are hereto attached as Exhibit U and Exhibit V and by reference are made parts hereof.

XVII.

The amounts of overassessments of taxes determined by the Commissioner in Exhibits P, Q, R, and S are the amounts of taxes assessed for the years 1922, 1923, 1924 and 1925, respectively, in excess of the tax liability for each of those years mutually agreed upon in Exhibit O.

The amounts of the overassessments were determined on the basis of grounds for refund specified in the claims for refund filed as aforesaid for the years 1922 to 1925, inclusive.

XVIII.

a. Not later than March 15, 1922, the Paper Company filed with the Collector for the year 1921 a return on a form, a copy of which is hereto attached and made a part hereof as Exhibit W, and paid to the Collector the amount of tax shown as due thereon. In said return no report was made or tax paid in respect of any interest owing by the Paper Company to the Fort Frances Company upon unpaid balances for newsprint paper supplied by the latter company to the former, and nowhere upon said return did the name of the Fort Frances Company appear.

b. On October 4, 1932, the Deputy Collector for the District of Minnesota, under the provisions of Section 3176 of the Revised Statutes, prepared and forwarded to the Commissioner of Internal Revenue a delinquent withholding tax return for the Paper Company, then in receivership under an order of this Court, reporting $164,525.98 as income paid by the Minnesota and Ontario Paper Company to Fort Frances Pulp and Paper Company, Ltd., during the year 1921. The Commissioner determined withholding tax, and penalty
196 and interest in respect thereof in the respective amounts of $16,452.60 tax, $4,113.15 penalty, and $10,556.14 interest. The Commissioner assessed against the said Paper Company the total amount of $31,121.89 on his July 10, 1933 assessment list for the District of Minnesota. A copy of said return is attached hereto marked Exhibit X and by reference made a part hereof.

Said withholding tax liability of $31,121.89 was satisfied as hereinbefore set forth in Paragraph XV (b) of this stipulation.

.....

Attorneys for Plaintiffs.

.....

Attorneys for Defendant.

Dated ....., 1936.

197 Exhibit A.

Petition.

In the District Court of the United States For the District of Minnesota, Third Division.

Minnesota and Ontario Paper Company, a corporation, 1100 Builders Exchange Building, Minneapolis, Minnesota, Plaintiff,

No. 2245. vs. Law.

Levi M. Willcuts, Collector of Internal Revenue, for the District of Minnesota, Defendant.

1. Plaintiff is a corporation duly incorporated under the laws of the State of Maine and is now and during all of the times hereinafter referred to was engaged in the manufacture of newsprint paper, kraft paper and insulating material, with its principal place of business at 1100 Builders Exchange Building, Minneapolis, Minnesota.

2. The defendant, Levi M. Willcuts, is now and during all of the times hereinafter referred to was the duly appointed and acting Collector of Internal Revenue for the District of Minnesota.

3. On March 14, 1923, pursuant to the provisions of Treasury Decision 3434, promulgated by the Commissioner of Internal Revenue on February 6, 1923, the plaintiff filed with the defendant a tentative return of its income for the taxable year 1922, said tentative return being filed on behalf of the plaintiff and its following named subsidiary corporations, to-wit:

International Lumber Company
Minnesota, Dakota and Western Railway Company
Rainy River Improvement Company
Falls Lumber and Coal Company
Watrous Island Boom Company.

198 Said tentative return disclosed an estimated tax liability of $70,000.00 on account of income taxes for the taxable year 1922 for said affiliated group. Said tentative return disclosed no specific items of income nor deductions.

4. On June 15, 1923, the plaintiff filed with the defendant a completed consolidated return for said taxable year 1922 on behalf of itself and said affiliated group, which return disclosed a net income, after deductions, of $534,550.16 and a tax liability of $66,818.77.

5. The defendant listed said completed consolidated return under Account No. 400,074, and plaintiff's payments upon said account were credited by the defendant as follows:

June 15, 1923	$15,909.39
July 17, 1923	17,500.00
Sept. 15, 1923	16,704.70
Dec. 15, 1923	16,704.68

6. The total amount of said tax was assessed against and all of said payments were made by the plaintiff.

7. On June 15, 1925, the plaintiff notified defendant in writing that plaintiff's income and excess profits tax returns for the years 1917 to 1920, inclusive, were pending on appeal to the United States Board of Tax Appeals and that the determination of the questions therein involved might have a bearing upon the consolidated returns filed subsequent to the year 1920, in which case amended consolidated returns would be filed for the years 1921 to 1924, inclusive, to accord with the decisions of the Board of Tax Appeals, when and as the same were rendered.

8. On March 6, 1926, the United States Board of Tax Appeals issued three separate orders relating to the plaintiff's taxes for the years 1917, 1918, 1919 and 1920, said orders affecting plaintiff's net loss in 1921, which net loss when carried forward to 1922, under the provisions of the revenue laws then in force, eliminated all profits of the plaintiff and its subsidiaries for the year 1922.

199 9. On March 12, 1926, plaintiff advised the Commissioner of Internal Revenue by letter that amended income and excess profits tax returns for the years 1921 to 1924, inclusive, would be filed immediately. Thereupon the Bureau of Internal Revenue caused an investigation of said years to be made by Field Agent A. W. Hayes, who advised plaintiff that amended returns would be rendered unnecessary by his report.

10. On June 5, 1926, said Agent A. W. Hayes submitted to the Internal Revenue Agent in Charge at St. Paul, Minnesota, his report of said investigation in which it was disclosed that inventory and other income adjustments arising from said prior years, 1917, 1918, 1919 and 1920 had eliminated all profit for the year 1922. Said report further disclosed that the plaintiff and its subsidiaries had a net loss of $240,379.60 for said year 1922 and that plaintiff was entitled to a refund of the entire amount of tax paid for said year 1922, to-wit: $66,818.77. Said Internal Revenue Agent

in Charge transmitted a copy of said report to the plaintiff on June 25, 1926.

11. On May 7, 1927, the Treasury Department notified plaintiff by letter that the findings disclosed in said Revenue Agent's report showing an overpayment of $66,818.77 had been approved, with the exception of $17,500.00 thereof, and that the balance of said overpayment, to-wit: $49,318.77, would be refunded.

12. On June 14, 1927, plaintiff filed with the defendant a claim for refund demanding the refund of said overpayment of $66,818.77.

13. On October 16, 1928, said claim for refund was allowed as to $49,318.77 thereof and rejected as to $17,500.00 thereof, but at the date of the filing of this petition no part of said amount has been refunded, credited or paid back to plaintiff, and the plaintiff further alleges that it was not at said time indebted to the defendant on account of any income, war profits or excess profits tax, or any installment thereof.

200 14. On April 30, 1929, the plaintiff filed with the defendant a perfected claim for refund for said year 1922 pursuant to the provisions of Treasury Decisions 4265 and 4266 promulgated by the Commissioner of Internal Revenue March 27, 1929, said claim for refund claiming a refund due to the plaintiff of $66,818.77.

15. On August 22, 1930, the Commissioner of Internal Revenue notified the plaintiff that its claim for refund of said taxes for 1922 in said amount of $66,818.77 had been rejected under schedule dated August 22, 1930.

16. By reason of the premises and the facts aforesaid, plaintiff claims that it is entitled to the payment of the full amount of said overpayment, to-wit: $66,818.77, and that said sum unlawfully is withheld by the defendant.

Wherefore, plaintiff asks judgment against defendant for the sum of $66,818.77, with interest at 6% per annum from June 15, 1923, on $15,909.39 thereof, with interest at 6% per annum from July 17, 1923, on $17,500.00 thereof with interest at 6% per annum from September 15, 1923, on $16,704.70 thereof and with interest at 6% per annum from December 15, 1923, on $16,704.68 thereof, together with the costs of this action.

CARMI A. THOMPSON &
ORVILLE SMITH,
JOSEPH B. SHEPLER,
Attorneys for Plaintiff,
2104 Terminal Tower Bldg.
Cleveland, Ohio.

United States of America,
State of Minnesota,
County of Hennepin—ss.:

E. W. Backus, being first duly sworn, deposes and says that he is the President of Minnesota and Ontario Paper Company, plaintiff in the aforesaid petition; that he has read the foregoing petition and is familiar with all of the facts therein alleged and that said facts, statements and
201 allegations therein contained are true, as he verily believes.

E. W. BACKUS.

Sworn to before me and subscribed in my presence this 25th day of September, 1930.

(Seal)

E. M. MERRICK,
Notary Public in and for Hennepin County, Minnesota.

My Commission expires Oct. 12th, 1930.

---

202 Exhibit B.

Answer.

United States District Court, District of Minnesota, Third Division.

Minnesota And Ontario Paper Company, a corporation, 1100 Builders Exchange Building, Minneapolis, Minnesota, Plaintiff,

No. 2245. vs. At Law.

Levi M. Willcuts, Collector of Internal Revenue for the District of Minnesota, Defendant.

The defendant, Levi M. Willcuts, Collector of Internal Revenue for the District of Minnesota, in answer to the petition of the plaintiff herein, denies each and every allegation thereof.

Wherefore, the defendant prays that the plaintiff take nothing herein, that the complaint be dismissed and for such other and further relief as to the Court may seem proper.

LEWIS L. DRILL,
United States Attorney and Attorney for the Defendant.

203 United States District Court, District of Minnesota, Third Division.

Minnesota And Ontario Paper Company, A Corporation, 1100 Builders Exchange Building, Minneapolis, Minnesota, Plaintiff,

No. 2245. vs. At Law.

Levi M. Willcuts, Collector of Internal Revenue for the District of Minnesota, Defendant.

State of Minnesota,
County of Ramsey—ss.:

Levi M. Willcuts, being first duly sworn, on oath says that he is the Collector of Internal Revenue for the District of Minnesota, the defendant in the above entitled action; that he has read the foregoing answer; that the same is true of his own knowledge except as to matters stated therein on information and belief, and as to such matters he believes it to be true.

LEVI M. WILLCUTS.

Subscribed and sworn to before me this 10th day of October, 1930.

E. M. HEIMBACH,
Notary Public, Ramsey County, Minn.

My Commission Expires Oct. 1st, 1932.

Seal

---

204 Exhibit "C".

Stipulation.

(Filed Feb. 26, 1926, United States Board of Tax Appeals.)

United States Board Of Tax Appeals.

Appeals of: Minnesota & Ontario Paper Co., and its Affiliated Corporations, to-wit: International Lumber Co. Falls Lumber & Coal Co. International Insulation Co. Minnesota, Dakota & Western RR. Co. Rainy River Improvement Co., and Watrous Island Boom Co.

Docket Nos. 2128-2127-2699.

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & On-

tario Paper Co., and its said affiliated corporations, hereinafter referred to as the "taxpayer", by its counsel, that the deficiency in tax of said taxpayer for the taxable years 1917, 1918, 1919 and 1920, shall be determined and assessed in accordance with the following agreement.

1.

That on or about October 1, 1908, the Minnesota & Ontario Paper Co. acquired from the Backus-Brooks Co., a corporation, all of the outstanding stock of the Ontario & Minnesota Power Co. Ltd., a Canadian corporation, and of the Rainy River Improvement Co., an American corporation, and other assets in exchange for its 10,000 shares of preferred stock of a par value of $1,000,000, and 50,000 shares of common stock of a par value of $5,000,000 and other considerations. That the value of the stock and other assets so acquired by the Minnesota & Ontario Paper Co. from the Backus-Brooks Co. in exchange for its 10,000 shares of preferred stock and 50,-
000 shares of common stock as referred to in para-
205 graph 2 of the taxpayer's amended petition filed with the Board of Tax Appeals on September 25, 1925, was $2,914,000.

II.

On or about December 31, 1905, the International Lumber Co. acquired from the Backus-Brooks Co. certain timber and other property in exchange for 6,000 shares of its capital stock of a par value of $100 per share. That the actual cash value of the timber so acquired by the International Lumber Co. for its said stock was $754,861.50, and the International Lumber Co. is entitled to include in its invested capital account said amount of $754,861.50.

The International Lumber Co. acquired by deed dated March 10, 1909, from the Backus-Brooks Co. certain timber and other property referred to in paragraph 2(a) of the taxpayer's amended petition, in exchange for 4,000 shares of its capital stock of a par value of $100 per share and cash in the amount of $198,396.78. The taxpayer is entitled to include in its invested capital account on account of the property so acquired for its stock and other considerations as hereinbefore mentioned said amount of $598,396.78.

III.

During the taxable years 1917, 1918, 1919 and 1920, the Minnesota & Ontario Paper Co. purchased from the Fort Frances Pulp & Paper Co. Ltd., a Canadian corporation, newsprint paper in the quantities and for the amounts hereinafter

stated, as alleged in paragraph 3 of the taxpayer's amended petition.

206

	Tons.	Purchase Price.
1917	28,685	$1,721,112.90
1918	22,907	1,512,114.65
1919	24,595	1,763,685.93
1920	36,736	3,688,378.98

That all of the newsprint so purchased by the Minnesota & Ontario Paper Co. from the Fort Frances Pulp & Paper Co. Ltd., was resold by the Minnesota & Ontario Paper Co. at a profit. The taxable profit derived by the Minnesota & Ontario Paper Co. from the sale of the newsprint paper purchased from the Fort Frances Pulp & Paper Co. Ltd., as aforesaid for each of said taxable years is, as follows:

1917	$ 88,982.87
1918	81,290.54
1919	97,989.68
1920	184,854.00

During the taxable years 1917, 1918, 1919 and 1920, the Minnesota & Ontario Paper Co. sold to the Fort Frances Pulp & Paper Co. Ltd., pulpwood in the quantities and for the amounts hereinafter stated, as alleged in paragraph 3(a) of the taxpayer's amended petition:

1917	27,939 2/8	$328,435.25
1918	13,492	161,904.00
1919	27,960 4/8	433,086.49
1920	31,718 4/8	666,364.50

During each of the taxable years 1917, 1918, 1919 and 1920, the Minnesota & Ontario Paper Co. sold to the Fort Frances Pulp & Paper Co. Ltd., sulphite in the quantities and for the amounts hereinafter stated, as alleged in paragraph 3(a) of the taxpayer's amended petition:

1917	9,995.8995	$ 774,486.51
1918	8,103.8552	526,750.60
1919	9,250.2030	948,163.89
1920	11,783.4686	1,296,992.74

That the total prices received by the Minnesota & Ontario Paper Co. from the Fort Frances Pulp & Paper Co.
207 Ltd., on the sale of said pulpwood and sulphite were fair and reasonable and the action of the Commissioner in allowing the transactions to stand, as shown by the

books of the taxpayer, is hereby accepted as correct by the taxpayer.

During each of the taxable years 1917, 1918, 1919 and 1920, the Minnesota & Ontario Paper Co. realized a gross profit on the sale of hog fuel to the Fort Frances Pulp & Paper Co. Ltd., as follows:

1917	$ 700.00
1918	8,080.00
1919	9,950.00
1920	16,350.00

in lieu of the profits shown for each of said years on the books of the taxpayer on account of the sale of hog fuel from the taxpayer to the Fort Frances Pulp & Paper Co. Ltd., for each of said years.

V.

That the International Lumber Co. is not entitled to include in its invested capital account for either or any of the taxable years 1917, 1918, 1919 and 1920, the value of the timber alleged to have been acquired from the Backus-Brooks Co. under an alleged contract bearing date of October 10, 1910, and referred to in paragraph 4 of the taxpayer's amended petition.

VI.

During the taxable years 1917, 1918, 1919 and 1920, the International Lumber Co. sustained losses in its timber and pulpwood holdings in the following amounts which the taxpayer is entitled to deduct from its gross income in computing its net income for the taxable years in question:

1917	Saw Timber	$24,672.92	Pulpwood	$3,431.40
1918	"	14,814.80	"	3,909.78
1919	"	17,993.14	"	3,598.32
1920	"	None	"	None

VII.

208 The taxpayer sustained depreciation on its logging spur known as the "Mizpah Spur" and referred to in paragraph 6 of the taxpayer's amended petition, for each of the taxable years 1917, 1918, 1919 and 1920, as follows:

1917	$ 7,605.04
1918	38,633.48
1919	18,952.36
1920	45,547.63

The taxpayer is not entitled to an allowance for depreciation on the Cut Foot Sioux line referred to in paragraph 6 of the taxpayer's amended petition in excess of the amount heretofore allowed by the Commissioner and the taxpayer's claim in respect thereto is hereby waived and withdrawn.

The taxpayer, the International Lumber Co., hereby waives and withdraws its claim with respect to the deduction claimed on account of fraud in the construction of the "Cut Foot Sioux" and "Galvin-Nett-Lake" lines as referred to in paragraph 6(a) of the taxpayer's amended petition.

VIII.

The value of the taxpayer's saw timber as of March 1, 1913, was $6.00 per 1,000 board feet and the value of its pulpwood as of said date was $1.00 per cord.

That in computing the net income of the International Lumber Co. for each of the taxable years 1917, 1918, 1919 and 1920, the following lumber inventory figures shall be accepted and agreed to by the parties to this stipulation:

December 31, 1916	$1,814,954.84
1917	1,540,481.55
1918	2,191,267.84
1919	2,149,496.20
1920	2,550,461.54

209 It is stipulated and agreed that the inventories shown above as December 31, 1920, in the amount of $2,550,461.54 includes at its proper value the 29,480,000 feet of lumber alleged to have been sold to the Keewatin Lumber Co. Ltd.

IX.

It is further stipulated and agreed that the claim of the taxpayer as set forth in paragraph 9 of the taxpayer's amended petition shall be adjusted in accordance with paragraph 9 of the Stipulation No. 1 heretofore filed before the United States Board of Tax Appeals.

X.

The claim of the Minnesota, Dakota & Western Railway Co. against the United States Government in the amount of $105,923.44 under Section 209 of the Transportation Act of 1920 should properly be accrued upon the books of the taxpayer for the taxable year 1920 and included in its taxable income for said year.

It is agreed that the taxpayer may at any time before the said claim is barred by the Statute of Limitations after the payment of the tax as computed under this stipulation (and notwithstanding anything herein or in any other agreement between it and the Commissioner of Internal Revenue, or the Secretary of the Treasury to the contrary) file a claim for refund for the tax imposed upon it by reason of this claim of $105,923.44 being taxed as taxable income. In the event that the said claim of $105,923.44 filed under Section 209, or any part thereof, is disallowed by the United States Government or withdrawn by the taxpayer said claim for refund shall thereupon be allowed as provided by law, together with such interest, if any, as may be permitted under the statute.

210

XI.

The taxpayer hereby withdraws its claim for a deduction of $144,535.79 on account of the tearing out and abandonment of a portion of the dam referred to in paragraph 11 of the taxpayer's amended petition, and accepts as correct the action of the Commissioner in refusing to allow the deduction taken on account of said item.

XII.

The taxpayer hereby withdraws its claim with respect to a loss alleged to have been sustained on account of the alleged sale of the Engler Mill Site referred to in paragraph 12 of the taxpayer's amended petition and accepts as correct the Commissioner's action in refusing to allow the deduction taken on account of said alleged transaction.

XIII.

The taxpayer hereby withdraws its claim with respect to a loss alleged to have been sustained on account of the alleged sale of the Beaver Land & Timber Co. asset referred to in paragraph 13 of the taxpayer's amended petition and accepts as correct the Commissioner's action in refusing to allow the deduction taken on account of said alleged transaction.

XIV.

It is further stipulated and agreed that the sum of $530,660.00 representing the gross selling price of the lumber alleged to have been sold by the taxpayer to the Keewatin Lumber Co. Ltd., as set forth in paragraph 14 of the taxpayer's amended petition, was erroneously added to the taxable net income of the International Lumber Co. as computed and set

out in the deficiency letter covering the taxable year 1920.

The taxpayer hereby withdraws its claim to the deduc-
211 tion on account of the loss alleged to have been sustained on account of said transaction and hereby agrees to and accepts as correct the action of the Commissioner in holding that said alleged sale was a nullity, void and of no effect.

XV.

The taxpayer hereby agrees to and accepts as correct the action of the Commissioner in disallowing as a deduction for the taxable year 1920 the sum of $213,068.94 referred to in paragraph 15 of the taxpayer's amended petition.

XVI.

The taxpayer hereby withdraws its claim with respect to the loss in its coal inventory of $60,200.00 referred to in paragraph 16 of the taxpayer's amended petition and hereby agrees to and accepts as correct the action of the Commissioner in refusing to allow the deduction taken in the year 1920 on account of said transaction.

XVII.

The taxpayer deducted from its income for the taxable year 1920 the sum of $46,417.92 on account of an alleged loss sustained as the result of a decision of the Supreme Court of the State of Minnesota rendered on December 26, 1919, and referred to in paragraph 17 of the taxpayer's amended petition. The Commissioner refused to allow any deduction on account of said alleged loss, and the taxpayer hereby withdraws its claim with respect to said loss and agrees to and accepts as correct the action of the Commissioner in disallowing same.

212

XVIII.

It is further stipulated and agreed that the Backus-Brooks Co. and the Minnesota & Ontario Paper Co. were not affiliated for the years 1917, 1918, 1919 and 1920, within the meaning of Section 240 of the Revenue Act of 1918, or any other Revenue Acts.

XIX.

During the taxable year 1920 the Ontario & Minnesota Power Co. Ltd., sold to the taxpayer (Minnesota & Ontario Paper Co.) certain horse power at $100 per horse power per annum. The fair market value of the horse power so purchased by the Minnesota & Ontario Paper Co. from the Ontario & Minnesota Power Co. Ltd., a Canadian corporation, and a subsidiary of the taxpayer (Minnesota & Ontario Paper

Co.) was $25.00 per horse power per annum and the taxpayer hereby agrees to and accepts as correct the action of the Commissioner in disallowing as a deduction by the taxpayer the sum of $152,998.88 on account of this item.

XX.

It is further stipulated and agreed that the action of the Commissioner in including in the taxable income of the Minnesota, Dakota & Western Railway Co. in each of the taxable years 1917, 1918, 1919 and 1920, the sum of $12,500.00 representing the interest accrued on the obligation of the International Bridge & Terminal Co., a Canadian corporation, referred to in paragraph 20 of the taxpayer's amended petition is hereby agreed to and accepted as correct by the taxpayer.

It is hereby stipulated and agreed that there shall be added to the invested capital of the taxpayer for each of the taxable years 1917, 1918, 1919 and 1920, the sum of $205,960.27, in addition to the amount heretofore allowed by the Commissioner on account of said obligation.

213

XXI.

The taxpayer, the Minnesota & Ontario Paper Co., is not entitled to have its excess profits taxes computed in accordance with the provisions of Section 210 of the Revenue Act of 1917, and Sections 327 and 328 of the Revenue Act of 1918.

XXII.

The taxpayer hereby agrees to and accepts as correct the action of the Commissioner in restoring to the taxable net income of the Minnesota & Ontario Paper Co. for the taxable year 1920 the sum of $10,400.00 taken as a deduction on account of the sale of stock of the Liberty National Bank which was consummated on January 31, 1921.

XXIII.

The taxpayer hereby consents to the action of the Commissioner in restoring to the taxable net income of the Rainy River Improvement Co. for the taxable year 1917 the sum of $9,250.00 as alleged in paragraph 26 of the Commissioner's answer to the taxpayer's amended petition on account of the payment made by it to the Virginia & Rainy Lake Lumber Co.

XXIV.

It is stipulated and agreed that the taxpayer erred in deducting from its taxable income for the year 1917 the sum of

$184,061.30 on account of the loss on "Kraft Mill" but the taxpayer was entitled to take such deduction for the taxable year 1918 and the taxable income for such two years shall be recomputed accordingly.

XXV.

The Commissioner hereby withdraws the claim asserted in respect to the accrual of taxes referred to in para-
214 graph 25 of the Commissioner's answer to the taxpayer's amended petition.

XXVI.

It is hereby expressly agreed and understood that the claim of the Minnesota, Dakota & Western Railway Co., in the sum of $158,035.00, arising under Section 204 of the Transportation Act of 1920 is excepted from the operation of this agreement and the taxpayer hereby waives the benefit of any statute of limitations and consents to the assessment of any additional tax which may result from the allowance and payment of all or any part of said claim at any time hereafter.

XXVII.

It is further stipulated and agreed that the understatement of the amount of the taxable net income as shown by the returns filed by the taxpayer herein for each of the taxable years 1917, 1918, 1919 and 1920, was due to negligence on the part of the taxpayer but without intent to defraud.

Dated: February 25, 1926.

THE MINNESOTA & ONTARIO
PAPER CO.
RALPH M. SHAW,
JOHN JUNELL,
Attorneys in Fact.

COMMISSIONER OF INTERNAL
REVENUE,
A. W. GREGG,
Solicitor of Internal Revenue.

AH E. C. L.

215 Exhibit D.

Order.

United States Board Of Tax Appeals.

Appeal of: Docket No. 2128.
Minnesota & Ontario Paper Co.

Now on this sixth day of March, 1926, the above entitled appeal coming on for hearing on the stipulation of the taxpayer and the Commissioner, signed and executed by their respective counsel, and it appearing from said stipulation and other documentary evidence submitted that the true tax liability of the Minnesota & Ontario Paper Co. and its affiliated corporations for the taxable year 1917 is $531,073.65 of which the sum of $41,540.25 has heretofore been paid, and the sum of $801,379.16 has heretofore been assessed, and it further appearing that there is due a penalty of $227,633.03, no part of which has been assessed or paid:

Now, therefore, it is considered and

Ordered that the amount of tax deficiency and penalty due from the taxpayer be and the same is hereby redetermined for the year 1917 to be $489,533.40 tax, and $227,633.03 penalty, and that of the tax heretofore assessed there shall be abated the sum of $270,305.51 and the amount of the penalty of $227,633.03 shall be assessed and paid.

Dated Washington, D. C., March 6, 1926.

J. G. KORNER, JR.,
AH Chairman, U. S. Board of Tax Appeals.

---

216 Exhibit E.

Order.

United States Board Of Tax Appeals.

Appeal of The Minnesota & Ontario Paper Co.

Docket No. 2127.

Now on this sixth day of March 1926 the above entitled appeal coming on for hearing on the stipulation of the taxpayer and the Commissioner, signed and executed by their respective counsel, and it appearing from said stipulation and other documentary evidence submitted that the true tax liability of the Minnesota & Ontario Paper Company and its affiliated corporations for the taxable year 1918 is $410,901.66 of which the sum of $56,958.18 has been paid and it appearing that the sum of $943,623.84 has heretofore been assessed and it further appearing that there is due a penalty of $139,897.55 no part of which has been assessed or paid.

Now therefore it is considered and

Ordered that the amount of tax deficiency and penalty due from the taxpayer be and the same is hereby redetermined for the year 1918 to be $351,943.48 tax deficiency, and $139,897.55 penalty, and that of the tax heretofore assessed there shall be abated the sum of $532,722.18 and the amount of the penalty of $139,897.55 shall be assessed and paid.

J. G. KORNER, JR.,
Chairman,
U. S. Board of Tax Appeals.

Dated, Washington, D. C., March 6, 1926.

---

217 Exhibit F.

Order.

United States Board Of Tax Appeals.

Appeal of The Minnesota & Ontario Paper Company

Docket No. 2699

Now on this the sixth day of March 1926 the above entitled appeal coming on for hearing on the stipulation of the taxpayer and the Commissioner, signed and executed by their respective counsel, and it appearing from said stipulation and other documentary evidence submitted that the true tax liability of the Minnesota & Ontario Paper Company and its affiliated corporations for the taxable years 1919 and 1920 is $651,758.92 and $1,031,825.89 respectively and it appearing that there is due in addition thereto a penalty of $165,834.17 and $255,514.46 for the said respective years of which amounts $160,398.39 and $111,053.04 of tax liability respectively has heretofore been assessed and paid.

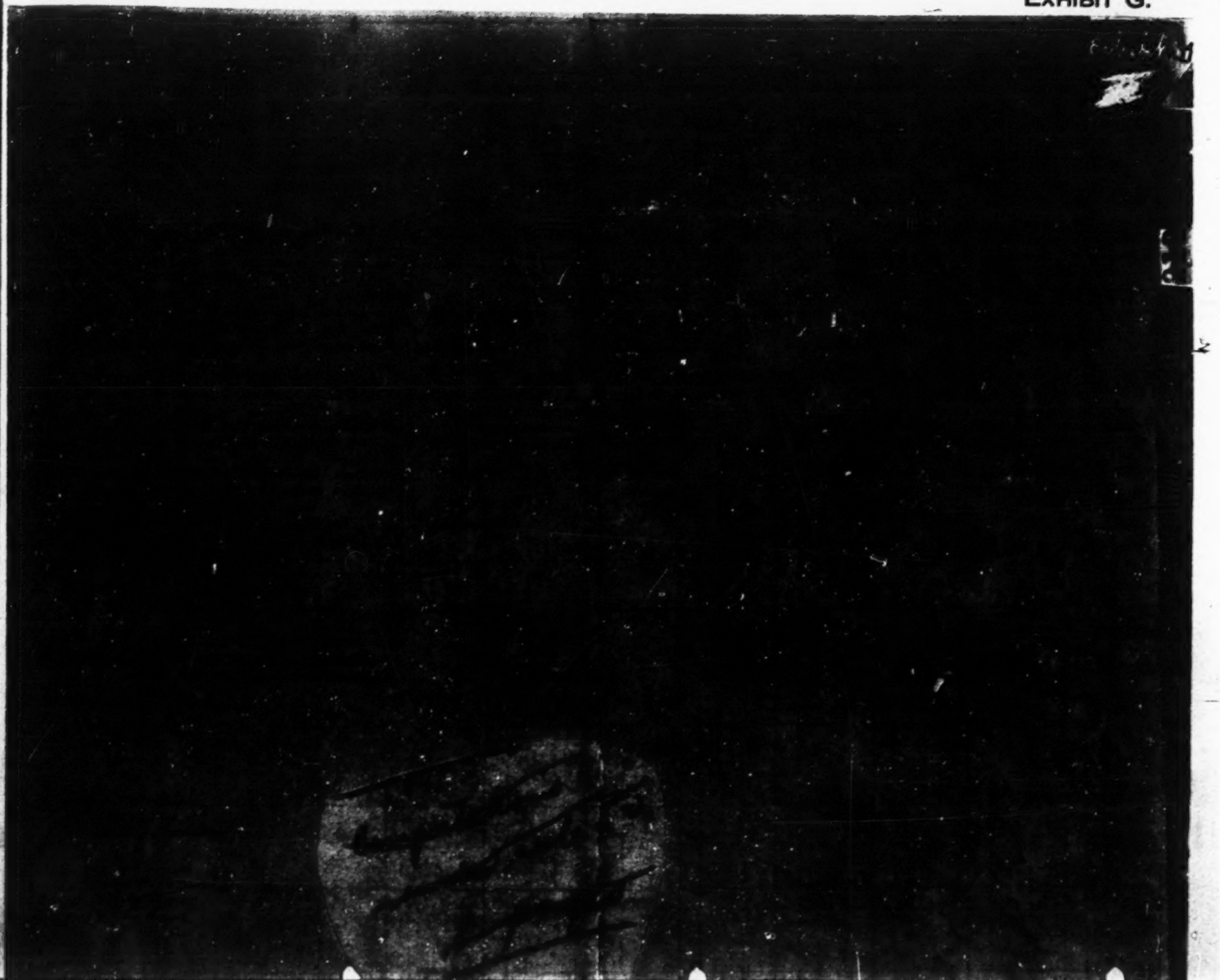
Now therefore it is considered and

Ordered that the amount of tax deficiency due from the taxpayer in and for the said years be and the same is hereby redetermined for the year 1919 to be $491,360.53 and for the year 1920 to be $920,772.85 and in addition thereto penalty in the amounts respectively of $165,834.17 and $255,514.46, which said tax deficiencies and penalties shall be assessed and paid.

Dated Washington, D. C., March 6, 1926.

J. G. KORNER, JR.,
Chairman,
U. S. Board of Tax Appeals.

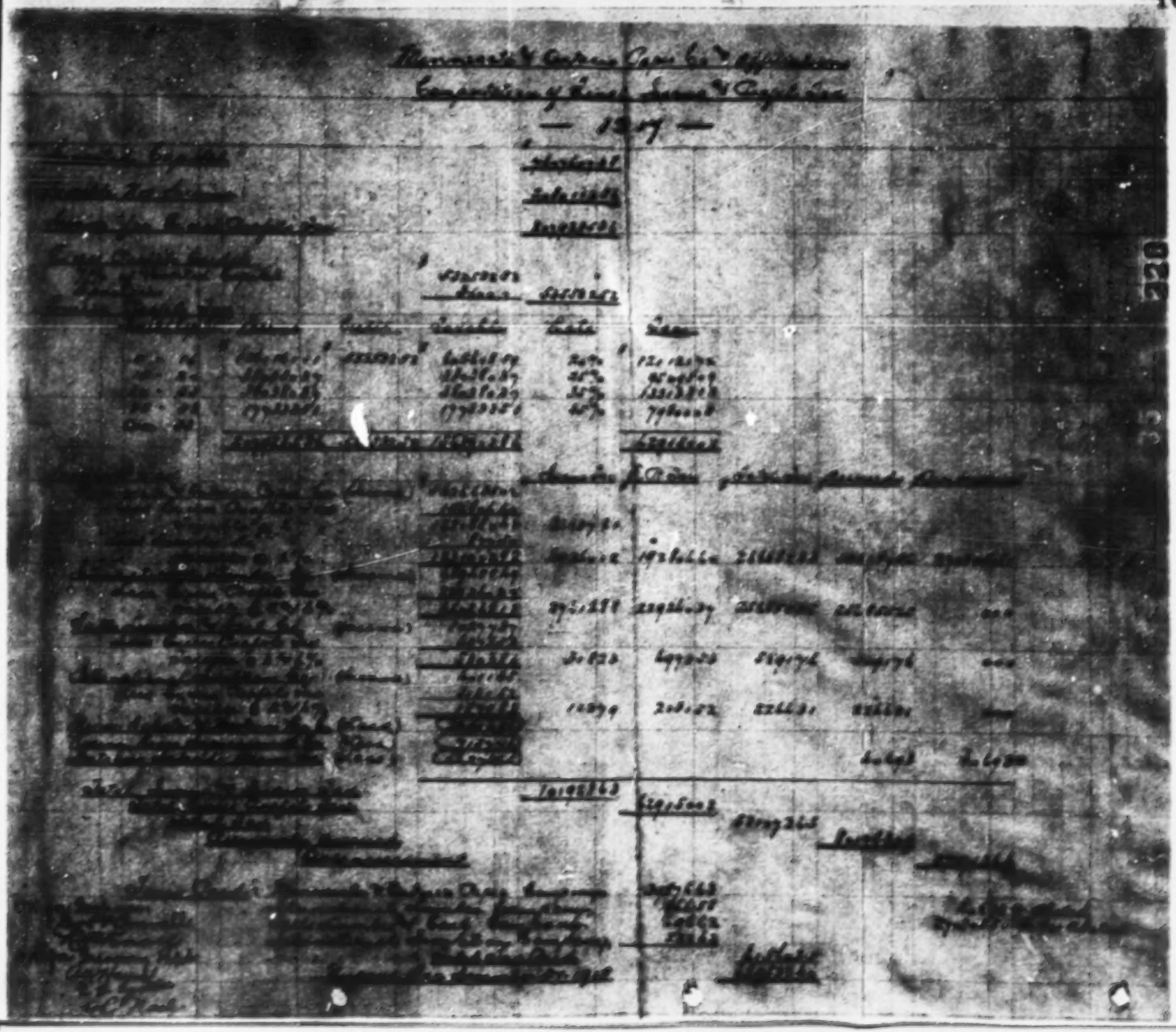
EXHIBIT G.



219

OK for Secretary:
[illegible]
Secretary

OK for Treasury Dept:
[illegible]
[illegible]



Statement of Excess Profits Tax Assessment
Computation of Capital Invested & Profits Tax
1918

Average Capital					
Invested for Year ending					
Ten Per Cent Standard:					
10% of Invested Capital					
Average					
Excess Profits Credit:					
8% of Invested Capital					
Average					
Excess Profits Tax:					
Applied	Income	Credit	Taxable	Rate	Tax
Return 20% Over 20% Table				20% 65%	does not apply
Excess Profits Tax:					Tax
Excess Profits Net Income Subject to Excess Profits Credit Invested @ 8%				20%	
Tax:					
Excess Profits Net Income					
Less Excess Profits Tax					
Excess Profits Net Income Subject to Excess Profits Tax				12%	
Net Income & Excess Profits Tax					
Previously Returned					
Over assessment					
Total Amount of Tax above Paid					
Unpaid Tax December 31 1919					

OK for Treasury
[illegible]

OK for Treasury Dept
[illegible]

-5-

Minnesota & Ontario Paper Company & Affiliations
Computations of Earned Income & Profits Tax

	— 1919 —					— 1920 —				
	Income	Credit	Taxable	Rate	Tax	Income	Credit	Taxable	Rate	Tax
				20 %	25,120.				20 %	
				40 %					40 %	

Minnesota & Ontario Power Co.
Detailed statement of the Expenditures

Account of Expenditures	1917	1918	1919	1920	1921
	Regular	Regular	Regular	Regular	Regular
Debits from individual Journal sheets and Journal of Expenditures					
From ... 1916 to March 31st 1917	7 yrs 9 mos	$1,150,340.00	$2,443,804.00		
March 31 - 1917	1 yr	7 yrs			
June 30 - 1917	1 yr	6 yrs 9 mos			
Sept 30 - 1917	1 yr	6 yrs 6 mos			
Dec 31 - 1917	1 yr	6 yrs 3 mos			
March 31 - 1918	1 yr	5 yrs			
June 30 - 1918	1 yr	4 yrs 9 mos			
Sept 30 - 1918	1 yr	4 yrs 6 mos			
Dec 31 - 1918	1 yr	4 yrs 3 mos			
March 31 - 1919	1 yr	3 yrs			
June 30 - 1919	1 yr	2 yrs 9 mos			
Sept 30 - 1919	1 yr	2 yrs 6 mos			
Dec 31 - 1919	1 yr	2 yrs 3 mos			
March 31 - 1920	1 yr	2 yrs			
June 30 - 1920	1 yr	1 yr 9 mos			
Sept 30 - 1920	1 yr	1 yr 6 mos			
Dec 31 - 1920	1 yr	1 yr 3 mos			
March 31 - 1921	1 yr	1 yr			
June 30 - 1921	1 yr	9 mos			
Sept 30 - 1921	1 yr	6 mos			
Dec 31 - 1921	1 yr	3 mos			
Total Estimate		$1,150,340.00	$2,443,804.00		

OK for the Purchasing Agent
Chief Engineer

OK for Secretary Pub. Works and Chairman Executive Committee

223

-7-

Manufacturers' Gauze Co.

Cash Liability - Gross Profits Tax

Year	Gross	Deductions	Taxable
1917	41,922,360	22,463,203	19,459,157
1918	35,964,210	12,866,740	23,097,470
1919	49,136,172	16,693,647	32,442,525
1920	92,077,815	22,650,664	69,427,151
Total	219,100,557	74,674,254	144,426,303

OK for the Taxpayer:
E. A. Stowell
Pittsburgh

OK for Treasury Dept.
Wm. Hayes
E. Lyndon Lee
W. H. Stark

Miscellaneous Corporations Paying Taxes by Affidavits

Summary of Gross Receipts, Taxes & Rate per Cent.

Name	Gross Receipts	Deductions	Net Receipts	Tax	Rate per Cent.
[illegible]	[illegible]		[illegible]	[illegible]	
[illegible]	[illegible]		[illegible]	[illegible]	
[illegible]	[illegible]		[illegible]	[illegible]	

COMMISSIONER'S

ASSESSMENT CERTIFICATE

strict of MINNESOTA Month MARCH SPL # 6 Year 1926

Tax Division, Chief of Division

squared and found to agree with sectional control ledgers. , Bookkeeper.

t the individuals, firms, and corporations reported by me on the attached list are liable for the amount of taxes, penalties, etc., entered opposite their ames are as follows:

, 192 Collector of Internal Revenue.

LIST	RETURNS FILED	EXCESS COLLECTIONS	TOTAL TAX
nal Assessments made by Commissioner:		Personal	$
		Corporation	$ 311021 83
l by collector			
al by commissioner			
by commissioner			
al			$ 311021 83

I have made inquiries, determinations, and assessments of taxes, penalties, etc., of the above classification specified in these lists, and find that the total as corrected by the statement of differences and as specified in the supplementary pages of this list made by me are due from the individuals whose names such amounts are placed, and that the amount chargeable to the collector is as above.

Revenue, MAR 8 1926, 192 Commissioner of Internal Revenue.

INSTRUCTIONS

e each month in quadruplicate by each tax division. The original and first copy must be forwarded with the duplicate copies of the monthly lists within ten days after the close of the month. The second copy must be submitted with the original and duplicate Form 820 to the Accounts and after the close of the month. One copy of this certificate (Form 23C) will be returned to the collector accompanied by a statement of differences an and by additional sheets (Form 23A) containing items assessed additionally by the Commissioner.

EXHIBIT H.

Exhibit H

226

179

TREASURY DEPARTMENT,
Internal Revenue Service.
Form 886A—Revised March, 1922.

ASSESSMENT LIST. SPECIAL NO 6

Page No. 0

District MINNESOTA — INCOME TAX — List MARCH 1926

	OLD BALANCE	DATE	DEBIT	CREDIT	NEW BALANCE	REMARKS
0						
1						
2						
3						
4	MINNESOTA & ONTARIO PAPER CO INTERNATIONAL FALLS MINN MAR 04 C SPL NO 6			PEN	227633 03	1917 CORP RAR JUNNY 4
5	MINNESOTA & ONTARIO PAPER CO INTERNATIONAL FALLS MINN MAR 05 C SPL NO 6			PEN	139897 55	1918 404185 RAR 5
6	MINNESOTA & ONTARIO PAPER CO INTERNATIONAL FALLS MINN MAR 06 C SPL NO 6		TAX 491360 55 PEN 165834 17 INT 807 71		658002 41	1919 1120 RAR AMD 6
7	MINNESOTA & ONTARIO PAPER CO INTERNATIONAL FALLS MINN MAR 07 C SPL NO 6		TAX 920772 85 PEN 255514 45 INT 1513 59		1177800 90	1920 JUN 400059 RAR 7
8						8
9						9

TREASURY DEPARTMENT

OFFICE OF

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

EXHIBIT I.

143

IT:AR:D-7
WRD

CERTIFICATE OF OVERASSESSMENT

Number: 1316756

Allowed: $ 10,222.00

Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1926 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account, #857857	None	None
Additional, October 31, 1931, list #6, page 1, line 0	$41,566.02	$11,539.98
Total assessed	$41,566.02	$11,539.98
Correct tax liability	33,566.47	9,318.53
Overassessment	$ 8,000.55	$ 2,221.45

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

ILD-3

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:

Respectfully,

Abated: $ 10,222.00

Credited: $
To Tax. Year

Credited: $
To Tax. Year

Refunded: $
Interest: $

(Signed) H. E. Robinson
Head of Division.

Exhibit I

GENERAL ACCOUNTING OFFICE COPY

228

Form 7776 A—Form approved by Comptroller General, U. S. Oct. 20, 1930.

a-3 (a)

Statement

IT-A-4 ——— , 19—

Tax Time

RECORD OF ASSESSMENTS AND PAYMENTS

Entries to be made by the Collector according to instructions. Show, in the sixth column, by symbols "PA", "AA" or "Co", the nature of each entry in the eighth column.

Character of assessment and period covered	List	Year	Month	Assessment No. on Page	Assessment No. on Line	Amount assessed	Form, Schedule, or Claim on Date	Form, Schedule, or Claim on Amount	PA AA Co
INCOME TAX						$		$	
					Total,	$	Total,	$	

Due date of original tax (for any taxable year) to which overpayment was applied as a credit.

Credited to Year 19____

List	Year	Month	Assessment No. on Page	Assessment No. on Line	Amount credited	Due date
					$	

Due date of additional tax (1939 and prior years) to which overpayment was applied as a credit.

Credited to Year 19____

List	Year	Month	Assessment No. on Page	Assessment No. on Line	Amount credited	Due date
					$	

Date of assessment of additional tax (1941 and later years) to which overpayment was applied as a credit.

Credited to Year 19____

List	Page	Month	Assessment No. on Page	Assessment No. on Line	Month credited	Date of assessment
					$	

I CERTIFY that the records of this office are as given above; that I have caused to be prepared on Form 7776-S the full, true, and correct transcript of all payments of the taxpayer as required by Instructions; that said transcript has been carefully checked, or certified for refund as shown on the reverse of this form.

Collector of Internal Revenue. By ——— Deputy Collector.

INTEREST ALLOWANCE (Entries required to be made by the Collector)	$	$	$	$
Date	Year / Month / Day	Year / Month / Day	Year / Month / Day	Year / Month / Day
1. Date to which interest was computed				
2. Date additional tax assessed				
3. Principal of tax				
4. Interest allowed				
5. Interest allowed	$	$	$	$
6. Total	$	Date of computation Collected		229 Journal Number

INCOME TAX UNIT

TREASURY DEPARTMENT

OFFICE OF

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

EXHIBIT J.

IT:AR:D-7
HLD

CERTIFICATE OF OVERASSESSMENT

Number: 1316757

Allowed: $ 13,449.44

Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1927 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account, #858039		
Additional, October 31, 1931, list #5, page 1, line 1	None	None
	$30,010.72	$10,883.84
Total assessed	$30,010.72	$10,883.84
Correct tax liability	18,965.14	8,479.98
Overassessment	$11,045.58	$ 2,403.86

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

HLD-2

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

13,449.44 By direction of the Deputy Commissioner:

Respectfully,

(Signed) H. B. ROSCHEN

Head of Division.

Abated: $

Credited: $
To Tax. Year

Credited: $
To Tax. Year

Refunded: $

Interest: $

Ex. Rec. J

230

GENERAL ACCOUNTING OFFICE COPY

Form 1118A – Form approved by Comptroller General, U. S. [illegible]

a-3

Revenue
IT-A-4 _____

T-D

Tax Year
_____, 19____

(Name of taxpayer)

RECORD OF ASSESSMENTS AND PAYMENTS

137

Entries to be made by the Collector according to instructions. Show, in the sixth column, by symbols "Pd.", "Ab." or "Cr.", the nature of each entry in the eighth column.

Character of assessment and period covered	List	Year	Month	Answer No. on: Page	Answer No. on: Line	Amount assessed	Paid, Abated, or Credited: Date	Paid, Abated, or Credited: Amount	Pd. Ab. Cr.
INCOME TAX						$		$	
						Total, $		Total, $	

Due date of original tax (for any taxable year) to which overpayment was applied as a credit.

Credited to Year 19____

List	Year	Month	Answer No. on: Page	Answer No. on: Line	Amount credited	Due date
					$	

Due date of additional tax (1920 and prior years) to which overpayment was applied as a credit.

Credited to Year 19____

List	Year	Month	Answer No. on: Page	Answer No. on: Line	Amount credited	Due date
					$	

Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19____

List	Year	Month	Answer No. on: Page	Answer No. on: Line	Amount applied	Date of assessment
					$	

I CERTIFY that the records of this office are as given above; that I have caused to be prepared on Form 7776-B the full, true, and correct transcript of all accounts of the taxpayer as required by instructions thereon; and that the amounts have been abated, credited, or certified for refund as shown on the reverse of this form.

_____ By _____

Collector of Internal Revenue. Deputy Collector.

INTEREST ALLOWANCE

(Entries not to be made by the Collector)

Items	$ Year	$ Month	$ Day	$ Year	$ Month	$ Day	$ Year	$ Month	$ Day	$ Year	$ Month	$ Day
1. Date to which interest was computed												
2. Date additional tax assessed												
3. Payment of tax												
4. Interest paid												
5. Interest allowed	$			$			$			$		
6. Total interest	$											

Date of computation _____

Examined.

231

Internal Revenue.

INCOME TAX UNIT

TREASURY DEPARTMENT
OFFICE
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON

IT:AR:B-7
[illegible]

CERTIFICATE OF OVERASSESSMENT

Number: 2223612

Allowed: $ 34,843.10

Schedule No. 50519

Mr. C. T. Jaffray and Mr. R. H. M. Robinson,
Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1928 indicates that the tax assessed for that year was in excess of the amount due:

	Income tax	Interest
Income tax assessed:		
Original account #227767	None	None
Additional, April 26, 1930, account A-320108, 1930	$7,756.88	$518.34
Additional, October 21, 1931, list #6, page 1, line 2	42,166.52	4,644.71
Total assessed	$49,926.10	$7,163.05
Correct tax liability	20,533.10	2,013.95
Overassessment	$29,392.00	$5,151.10

In the determination of this overassessment the grounds set forth in your claim for refund of $7,756.88 have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1108(a) of the Revenue Act of 1928.

(See page 2 attached.)

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.

By direction of the Deputy Commissioner:
Respectfully,

Abated: $34,843.10
Credited: $
To Tax. Year
[illegible]-B
Credited: $
To Tax. Year

(Signed) H. D. ROSSELOT
Head of Division.

Refunded: $
Interest: $

Exhibit K.
[illegible]

GENERAL ACCOUNTING OFFICE COPY

232

Form 1774-A—Form approved by Comptroller General, U. S. Oct. 29, 1930. 8-1400a

- 2 -

Mr. C. T. Jaffray and Mr. R. H. M. Robinson, Receivers, Minnesota and Ontario Paper Company.

CERTIFICATE OF OVERASSESSMENT

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 822 of the Revenue Act of 1928.

[illegible]-B

Exhibit K
[illegible]
A-5

233

EXHIBIT K.

191

191

(Name of taxpayer)

RECORD OF ASSESSMENTS AND PAYMENTS

Entries to be made by the Collector according to instructions. Show, in the sixth column, by symbols "D.", "Ab." or "Cr.", the nature of each entry in the eighth column.

List	Year	Month	Answer No. on Page	Answer No. on Line	Amount assessed	Date	Amount	Ref. No. Cr.
					$		$	
					Total, $		Total, $	

Due date of assessment tax (for any taxable year) to which overpayment was applied as a credit.

Credited to Year 19.....

List	Year	Month	Answer No. on Page	Answer No. on Line

Amount credited	Due date
$	

Due date of additional tax (1920 and prior years) to which overpayment was applied as a credit.

Credited to Year 19.....

List	Year	Month	Answer No. on Page	Answer No. on Line

Amount credited	Due date
$	

Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19.....

List	Page	Month	Answer No. on Page	Answer No. on Line

Amount	Date of assessment
$	

I CERTIFY that the records of this office are as given above; that I have entered to be prepared on Form 7770-B the full, true, and correct transcript of all accounts of the taxpayer as required by Instructions thereon; that all the amounts have been abated, credited, or certified for refund as shown on the reverse of this form.

....., Collector of Internal Revenue. By ....., Deputy Collector.

INTEREST ALLOWANCE (Entries not to be made by the Collector)

Date	$ Year	$ Month	$ Day	$ Year	$ Month	$ Day	$ Year	$ Month	$ Day	$ Year	$ Month	$ Day
1. Date to which interest was computed												
2. Date additional tax assessed												
3. Payment of tax												
4. [illegible]												
5. [illegible]												
6. [illegible]												

234

235 Exhibit L.

Form 843
Treasury Department
Internal Revenue Service
Revised June, 1930

Claim.

To be filed with the Collector where Assessment was made or Tax Paid.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side,

Collector's Stamp (Date Received)

x Refund of Tax Illegally Collected.

Refund of Amount Paid for Stamps Unused, or Used In Error or Excess.

Abatement of Tax Assessed (Not Applicable to Estate or Income Taxes).

State of Minnesota,
County of Hennepin—ss:

Name of Taxpayer or Purchaser of stamps: C. T. JAFFRAY AND R. H. M. ROBINSON, Receivers for Minnesota and Ontario Paper Company

Business Address: 1100 Builders Exchange Building, (Street) Minneapolis, Minnesota. (City) (State)

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed St. Paul, Minnesota.
2. Period (If for Income Tax, make separate form for each taxable year) from June 1, 1928, to December 31, 1928.
3. Character of Assessment or tax Corporation Income Taxes.
4. Amount of assessment, $7,758.58; dates of payment April 23, 1930.

5. Date stamps were purchased from the Government .....

236 6. Amount to be refunded $7,758.58.

7. Amount to be abated (not applicable to income or estate taxes) $.....

8. The time within which this claim may be legally filed expires, under Section 322 (h) of the Revenue Act of 1928, on April 23, 1932.

The deponent verily believes that this claim should be allowed for the following reasons:

Reference is herewith made to a "Statement of Objections" dated January 27, 1932, filed by C. T. Jaffray and R. H. M. Robinson, Receivers for Minnesota and Ontario Paper Company, against the additional assessment of corporation Income Taxes for years, 1926, 1927 and 1928, and on basis of said statement, the taxpayer is entitled to a refund for the year 1928 amounting to $7,758.58 plus interest thereon as provided by law.

All of the facts recited in said statement are incorporated herein by reference with the same force and effect as if fully rewritten herein.

Signed C. T. JAFFRAY AND R. H. M. ROBINSON, Receivers for Minnesota and Ontario Paper Company,
By C. T. Jaffray,
And
By R. H. M. Robinson.

Sworn to and subscribed before me this 8th day of February, 1932.

E. M. MERRICK,
Notary Public, Hennepin County, Minn.

My commission expires Oct. 12, 1937.

---

237 Exhibit M.

Petition for Order Authorizing Receivers to enter into an Agreement with the Commissioner of Internal Revenue Relating to Income Tax Liability of the Defendant Company and of certain of its Subsidiaries.

In The District Court of The United States In and for The District of Minnesota, Fourth Division.

Wirt Wilson & Company, a corporation, Complainant,
No. 1950. vs. Equity.
Petition No. 102.
Minnesota and Ontario Paper Company, a corporation, Defendant.

Come now C. T. Jaffray and R. H. M. Robinson, as Receivers of Minnesota and Ontario Paper Company, the defendant above named, and represent to and petition the Court as follows:

1. In connection with the income situation of the defendant Company and of certain of its subsidiary companies for the years 1922 to 1928 inclusive, and with respect to the liability of the defendant Company under the tax free covenant of its First Mortgage Indenture of April 1, 1925, and with respect to the tax free covenant in its Five Year Gold Notes, your Receivers since their appointment have carried on almost continuous negotiations with the Commissioner of Internal Revenue of the Treasury Department of the United States, with a view of reaching agreement respecting
238 said matters and as the result of negotiations recently had with said Commissioner of Internal Revenue, your Receivers now report to the Court that in behalf of the receivership estate of the defendant Company and of certain of its subsidiary companies hereinafter named, they have reached an agreement with said Commissioner, the particulars of which are hereinafter set out, subject to the approval of this Court.

2. The subsidiaries of the defendant Company which are parties to the proposed agreement are the following:

> Falls Lumber and Coal Company, The Insulite Company (heretofore known as International Insulation Company), International Lumber Company, Minnesota, Dakota & Western Railway Company, Minnesota Forest Products Company, Rainy River Improvement Company, and Watrous Island Boom Company,

said Companies being hereinafter collectively referred to as "the subsidiary companies".

3. That the Collector of Internal Revenue for the District of St. Paul, Minnesota, acting under the direction of the Commissioner of Internal Revenue on June 11, 1932, filed in these proceedings an intervening complaint wherein it is

alleged that the defendant Company is indebted to said Collector in the amount of $243,635.25, together with interest thereon from and after certain dates therein mentioned. A copy of said intervening complaint is hereto attached marked Exhibit "A" and hereby made a part hereof. The items of said claim as set forth in said Exhibit "A", consist of the following:

239

	Year	Principal Amount of Deficiency Asserted.	Interest thereon to date of Assessment.	Total Amount of Claim
Income Taxes	1924	$ 41,851.55	$14,694.77	$ 56,546.32
" "	1925	3,344.96	1,049.03	4,393.99
" "	1926	41,566.02	11,539.98	53,106.00
" "	1927	50,010.72	10,883.84	60,894.56
" "	1928	42,166.52	6,646.71	48,813.23
Withholding Taxes	1930	17,933.21	—	17,933.21
" "	1931	1,947.94	—	1,947.94
Total amount of Amended Claim		$198,820.92	$44,814.33	$243,635.25

4. In addition to the principal amount of the deficiency of $198,820.92 above indicated, the Commissioner of Internal Revenue has also asserted a claim against said International Lumber Company for the year 1923, which claim is now pending before the United States Board of Tax Appeals and bears docket Number 41834.

5. The proposed agreement to be made by your Receivers and the subsidiary companies is hereto attached marked Exhibit "B" and hereby made a part hereof. In addition to the execution and delivery of said agreement Exhibit "B", and as supplementary thereto, it is proposed that there be executed and delivered those certain additional instruments, of which copies are hereto attached, respectively identified as Exhibits "C" to "I" inclusive, said instruments being as follows:

Exhibit "C"—Proposed Stipulation to be filed in the United States District Court, District of Minnesota, Third Division, in the action entitled "Minnesota & Ontario Paper Company, a corporation, vs. L. M. Willcuts, Collector of Internal Revenue", Division Law 2245, covering taxes for the year 1922.

Exhibit "D"—Stipulation in the Board of Tax Appeals on appeal of the International Lumber Company, Docket No. 41384, and relating to the year 1923.

Exhibit "E"—Proposed Stipulation in the Board of Tax Appeals on appeal of Minnesota & Ontario Paper Company, Docket No. 52110, and relating to the year 1924.

240 Exhibit "F"—Proposed Stipulation of the Board of Tax Appeals on appeal of Minnesota & Ontario Paper Company, Docket No. 51134, and relating to the year 1925.

Exhibit "G"—Proposed letter to be signed by the Receivers of the Minnesota and Ontario Paper Company consenting to the assessment of taxes withheld for the years 1930 and 1931.

Exhibit "H"—Proposed Stipulation for dismissal of action of the Minnesota & Ontario Paper Company vs. United States of America, Docket No. K-436, in the Court of Claims of the United States and relating to the Capital Stock Taxes.

Exhibit "I"—Proposed Stipulation for dismissal of action of the International Lumber Company vs. United States of America, Docket No. K-437, in the Court of Claims of the United States and relating to the Capital Stock Taxes.

6. The various proceedings now pending in connection with the taxes above indicated and which will be affected by the execution and delivery of Exhibits "B" to "I" inclusive, are as follows:

Year 1922.

There is pending in the District Court of the United States, for the District of Minnesota, Third Division, as Law Case No. 2245, suit by the defendant Company against Levi M. Willcuts, Collector of Internal Revenue, for the recovery of $66,818.77, plus interest thereon from the date of payment of taxes in 1923. The proposed settlement will result in the allowance of a credit or refund on this item in the amount of $49,318.77, with interest.

Year 1923.

Taxes for this year are now pending on petition filed with the United States Board of Tax Appeals by International Lumber Company as petitioner, bearing Docket No. 41834. The net deficiency asserted by the Commissioner for this year against the defendant Company and the affiliated companies amounts to $12,066.78. Under the terms of the pro-
241 posed agreement, Exhibit "B" and documents supplementary thereto, the deficiency thus asserted against International Lumber Company will be cancelled and the defendant Company will be allowed a credit or refund of $29,427.69, with interest.

Years 1924 and 1925.

The taxes for these years are pending in the United States Board of Tax Appeals on petitions filed by the defendant Company as petitioner, bearing Docket Nos. 51134 and 52110. The Commissioner has asserted deficiencies of $41,851.55 for 1924 and $3,344.96 for 1925. Under the proposed agreement, Exhibit "B", and documents supplementary thereto, the taxpayer will be allowed credits or refunds of $23,904.23 for 1924 and $7,800.00 for 1925, with interest.

Years 1926, 1927 and 1928.

The Commissioner has asserted and assessed deficiencies against the defendant Company for these years as follows:

Year	1926	$41,566.02	(Not	Including	Interest)
"	1927	50,010.72	"	"	"
"	1928	42,166.52	"	"	"
		$133,743.26			

These deficiencies are included in the items shown upon Exhibit "A". Under the proposed agreement, Exhibit "B", these deficiencies will be reduced in the following amounts:

Year	1926	$33,565.47	(Not	Including	Interest)
"	1927	38,965.14	"	"	"
"	1928	12,776.52	"	"	"
		$85,307.13			

Attention is directed to the fact that the agreement, Exhibit "B", reserves to the defendant Company the right to contest the disallowance of the deduction claimed by the defendant Company for the year 1926 in the amount of $790,455.20, representing a payment made on March 22, 1926, to the
242 United States Government in connection with the payment of additional Federal income, war-profits and excess-profits taxes for the years 1917 to 1920 inclusive.

Years 1930 and 1931.

There is included among the items set forth in the intervening complaint of said Collector, Exhibit "A", the following amounts representing taxes withheld by the defendant Company in 1930 and prior to its receivership in 1931, on account of interest paid to its security holders under tax free covenants contained in its securities:

Year 1930	$17,933.21
" 1931	1,947.94

As provided in Exhibit "G" hereto attached, these amounts will be credited against refunds to be allowed the defendant Company for the years 1922 to 1925 inclusive.

7. Attention is directed to the reservation in the agreement, Exhibit "B", whereby the defendant Company and the subsidiary companies may file claims for refund in the event of any payments which may be made by Minnesota, Dakota & Western Railway Company under Section 15a of the Transportation Act of 1920, this section being applicable to the "recapture" liability of common carriers. Legislation now pending in Congress indicates that this Act will be repealed, although it is uncertain whether such appeal will apply retroactively to prior years.

8. Attention is further directed to the fact that the agreement, Exhibit "B", excepts from the matters thereby determined, the liability, if any, of the defendant Company in respect of withholding taxes as provided for in Section 237 of the Revenue Acts of 1921, 1924 and 1926, on account
243 of interest paid by it to its Canadian subsidiary, The Fort Frances Pulp & Paper Company Limited.

9. As regards the several matters to be dealt with under the agreement, Exhibit "B", and Exhibits "C" to "I" inclusive, the understanding between your Receivers and the subsidiary companies on the one hand, and the Commissioner of Internal Revenue on the other hand, is that none of said documents shall become effective except upon condition that each and all of said documents become effective at the same time.

10. It is estimated that the carrying out of the foregoing agreement will result in the allowance of credits or refunds to the defendant Company and the subsidiary companies for the years 1922 to 1925 inclusive, with estimated interest to June 15, 1933, of approximately $168,450.69; and that upon the allowance of such credits or refunds the Commissioner will apply there against deficiencies in income taxes for the years 1926, 1927 and 1928, and withholding taxes for the years 1930 and 1931, together with estimated interest thereon at six (6) per cent per annum to June 15, 1933, totalling approximately $133,188.28, thus resulting in a credit balance due to the defendant Company of approximately $35,262.41; provided, however, that the Commissioner may assert the right to withhold the immediate refund of this amount pending his decision on the liability, if any, of the defendant Company in respect of withholding taxes as provided in Section 237 of the Revenue Acts of 1921, 1924 and 1926 on account of interest paid by it to its Canadian subsidiary, The Fort Frances Pulp & Paper Company, Limited.

244 11. With respect to the years 1926, 1927 and 1928, it is the intention of your Receivers upon the consummation of the transactions provided for in said agreement, Exhibit "B", and supplementary documents, to file claims for refund in connection with the disallowance to the defendant Company of its deduction from income of $790,455.20 paid in 1926, as more particularly hereinabove set out.

12. It is the judgment of your Receivers, after an extended consideration of these matters, in which they have had the advice and counsel of their attorneys and of Mr. A. A. Figen, who has been for many years largely engaged in dealing with tax matters, and who has had charge of the tax matters of the defendant Company and of its subsidiary companies since the year 1927, that the making of the agreement, Exhibit "B", and of the several documents supplementary thereto, is in the best interests of the receivership estate and of the subsidiary companies, and of all parties interested therein, and your Receivers therefore recommend to the Court that they be authorized and empowered to join in the execution and delivery of said Exhibit "B" and "G", and to cause to be executed in their behalf such of the other of said Exhibits as may provide for execution by attorneys representing your Receivers, and to cause the execution and delivery in behalf of the several subsidiary companies of the agreements and documents drawn for their respective signatures, and to execute and deliver such further and additional agreements and stipulations, if any, as in the judgment of your Receivers may be or become necessary or advisable to deal with the foregoing matters, including the right to make such modifications or amendments of the terms and provisions hereinabove referred to, as may be found necessary in the consummation of the matters hereinabove described.

245

Wherefore, Your Receivers respectfully pray the Court for an order authorizing and empowering them to join in the execution and delivery of said Exhibits "B" and "G" and to cause to be executed in their behalf such of the other of said Exhibits as may provide for execution by attorneys representing your Receivers, and to cause the execution and delivery in behalf of the several subsidiary companies of the agreements and documents drawn for their respective signatures, and to execute and deliver such other and additional agreements and stipulations, if any, as in the judgment of your Receivers may be or become necessary or advisable to deal with the foregoing matters, including the right to make such modifications or amendments of the terms and provisions hereinabove referred to as may be found necessary in the con-

summation of the transactions hereinabove described, and for such other and further relief as in the judgment of the Court may be deemed proper.

Dated this 10th day of June, 1933.

C. T. JAFFRAY AND R. H. M. ROBINSON,
By R. H. M. Robinson,
As Receivers of Minnesota and Ontario Paper Company, Petitioners.

Cobb, Hoke, Benson, Krause & Faegre,
1260 Northwestern Bank Building,
Minneapolis, Minnesota.

Fowler, Carlson, Farber & Johnson,
815 New York Life Building,
Minneapolis, Minnesota.
Attorneys for Receivers.

246 State of Minnesota,
County of Hennepin.—ss.:

R. H. M. Robinson, being first duly sworn, says that he is one of the Receivers in the above entitled matter; that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge.

R. H. M. ROBINSON.

Subscribed and sworn to before me this 10th day of June, 1933.

LILLIAN LUND,
Notary Public.
Hennepin County, Minn.

(Notarial Seal)

My Commission Expires June 5th, 1935.

---

247 Exhibit "A".

Intervening Complaint of Collector of Internal Revenue, District of Minnesota.

In The District Court of the United States In and for the District of Minnesota, Fourth Division.

Wirt Wilson & Company a corporation, Complainant,
No. 1950. vs. Equity.
Minnesota And Ontario Paper Company, a corporation, Defendant.

Now comes L. M. Willcuts, Collector of Internal Revenue, in the District of Minnesota, and pursuant to the order of

the above named Court made herein the 18th day of September, 1931, entitled "Order Limiting Time for Creditors to File Claims", as and for its complaint in intervention in the above proceeding complains and alleges as follows:

I.

That at the time of the appointment of the Receivers in the above entitled action on February 28, 1931, the above named defendant Minnesota and Ontario Paper Company, a corporation, was justly and truly indebted to intervenor in the sum of $243,635.25, together with interest thereon at the rate of 12 per cent per annum from and since the 12th day of June, 1931, on $60,940.31; 12 per cent per annum from and since the 15th day of June, 1931 on $17,933.21; and 12 per cent per annum from and since the first day of November, 1931 on $162,813.79; and 12 per cent per annum from and since the 15th day of June, 1932, on $1,947.94.

II.

That the consideration for the said claims is as follows:

Section 274		Section 144	
Rev. Act 1924—Add'l Income Tax 1924—	$56,546.32	Rev. Act 1928 Withholding	
Rev. Act 1924—Add'l Income Tax 1925—	4,393.99	Tax 1930—	$17,933.21
Rev. Act 1926—Add'l Income Tax 1926—	53,106.00		
Rev. Act 1926—Add'l Income Tax 1927—	60,894.56	Tax payable at source	
Rev. Act 1928—Add'l Income Tax 1928—	48,813.23	for 1931—	1,947.94

III.

That true and correct copies of all written instruments upon which Intervenor bases his claim are hereto attached and made a part hereof. That a true and correct Bill of Particulars of Intervener's open account (if the claim be based upon an open account) is hereto attached and made a part hereof.

IV.

That no security whatsoever is held for Intervenor's claim.

That this claim is entitled to be paid before all other claims, the priority of the United States for the payment of taxes being fully determined by Section 3466 of the Revised Statutes and Section 64 (a) of the Bankruptcy Act.

And attention is hereby called to Section 3467 of the Revised Statutes which provides that every executor, administrator, or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States

from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

V.

That no payments whatsoever have been made upon Intervenor's claim, and the whole amount thereof is justly owing from the said defendant Minnesota and Ontario Paper Company, a corporation, to Intervenor.

Wherefore: Intervenor prays that its claim be established in this proceeding in the sum of $243,635.25, together with interest thereon at the rate of 12 per cent per annum from and since the 12th day of June, 1931, on $60,940.31; 12 per cent per annum from and since the 15th day of June, 1931 on $17,-933.21; 12 per cent per annum from and since the 1st day of November, 1931 on $162,813.79; and 12 per cent per annum from and since the 15th day of June, 1932 on $1,947.94.

(Signed) L. M. WILLCUTS,
L. M. Willcuts, Collector,
Intervenor.

St. Paul, Minnesota.
(Address)

.....
Attorneys for Intervenor.

.....
(Address)

(Verification by Individual.)

State of Minnesota,
County of Ramsey—ss.

L. M. Willcuts, Collector, being duly sworn, deposes and says that he is the Intervenor named in and who executed the foregoing complaint in intervention; that he has read said intervening complaint, knows the contents thereof and states that the same are true of his own knowledge, except as to matters therein stated on information and belief and as to such he believes them to be true.

(Signed) L. M. WILLCUTS,
L. M. Willcuts, Collector of Internal Revenue, District of Minn.

Subscribed and sworn to before me this 10th day of June, 1932.

(Signed) E. M. HEIMBACH,
Notary Public, Ramsey County, Minn.

My Commission expires Oct. 1st, 1932.

(Verification by Intervenor—Corporation)

State of .....,

County of .....—ss.

....., being duly sworn, deposes and says that he is the ..... of the ....., the Intervenor named in and who executed the foregoing complaint in Intervention; that he has read said intervening complaint, knows the contents thereof and states that the same are true of his own knowledge, except as to matters therein stated on information and belief and as to such he believes them to be true.

.....

Subscribed and sworn to before me this ..... day of

....., 1931.

.....

(Verification by Attorney for Intervenor.)

State of .....,

County of .....—ss.

....., being duly sworn, deposes and says that he is the attorney for the Intervenor named in the foregoing complaint; that he has read said intervening complaint, knows the contents thereof and states that the same are true, except as to matters therein stated on information and belief, and as to such he believes them to be true.

.....

Subscribed and sworn to before me this ..... day of

....., 1931.

.....

248

Exhibit "B"

Treasury Department
Internal Revenue Service
Form 866-CR
GC:R:ECH-C1-6413

Agreement as to Final Determination of Tax Liability

This Agreement, made in duplicate under and in pursuance of Section 606 of the Revenue Act of 1928, by and between

Name and Address	State of Incorporation	Period
Minnesota & Ontario Paper Company 1100 Builders Exchange, Minneapolis, Minnesota	Maine	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Falls Lumber & Coal Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
International Insulation Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927, 1928
International Lumber Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years, 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Minnesota, Dakota & Western Railway Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Minnesota Forest Products Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Rainy River Improvement Company 1100 Builders Exchange Minneapolis, Minnesota	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927, and 1928
Watrous Island Boom Company 1100 Builders Exchange Minneapolis, Minnesota		Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928

taxpayers affiliated under Section 240 of the Revenue Acts of 1921, 1924 and 1926 and Section 142 of the Revenue Act of 1928, having their principal places of business at the address shown above and the Commissioner of Internal Revenue:

Whereas, there has been a determination of the tax liability of said taxpayers in respect of income tax imposed by the Revenue Acts of 1921, 1924, 1926 and 1928, for each taxable period stated above falling under the provisions of
249 those acts in the sum of

$ 17,500.00 for the calendar year 1922,
$136,925.19 for the calendar year 1923,
$ 47,022.71 for the calendar year 1924,
$ 1,565.77 for the calendar year 1925,
$ 33,565.47 for the calendar year 1926,
$ 38,965.14 for the calendar year 1927, and
$ 20,533.10 for the calendar year 1928.

exclusive of any penalty or interest applicable thereto as provided by law:

Now, This Agreement Witnesseth, that said taxpayers and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if this agreement is approved by the Secretary of the Treasury, or the Under Secretary, within one year from the date this agreement is signed by said taxpayer.

Reserving, however, to the taxpayers the right to contest the disallowance of the deduction claimed for the year 1926 in the amount of $790,455.20, which amount was paid, on March 22, 1926, to the United States Government in connection with the payment of additional Federal income, war-profits and excess-profits taxes for the calendar years 1917 to 1920, inclusive, and which amount the taxpayers contend was deductible as interest on deficiencies in taxes, and/or was deductible as a penalty, which contentions the Government denies, and reserving to the taxpayers the right to any benefit from the reduction in Federal income taxes, for the years 1926, 1927 and 1928, that will result in the event of a final conclusion of the issues favorable to the taxpayers.

Reserving also to the taxpayers expressly any and all rights which might hereafter accrue to them under Section 1107 of the Revenue Act of 1932 or any similar provision hereafter enacted, and it is stipulated that the execution hereof shall not preclude the taxpayers from recovering any refunds specified thereunder,—said Section 1107 relating to payments under Section 15 a of Interstate Commerce Act.

Provided also that nothing in this agreement shall be determinative of the liability of the Minnesota & Ontario Paper Company for the taxes provided in Section 237 of the Revenue

Acts of 1921, 1924, and 1926 on account of interest paid by that company to the Fort Frances Pulp and Paper Company, Limited, A Canadian Corporation, Fort Frances, Ontario.

In Witness Whereof, the Commissioner and the undersigned corporations have subscribed their names to these presents in duplicate.

Signed this ..... day of ....., 1933.

(Seal)

---

252 Exhibit "C".

Stipulation For Dismissal.

In The District Court of The United States for The District of Minnesota, Third Division.

Minnesota and Ontario Paper Company, a corporation, 1100 Builders Exchange Bldg., Minneapolis, Minnesota, Plaintiff,

No. 2245. vs. Law.

Levi M. Willcuts, Collector of Internal Revenue for the District of Minnesota, Defendant.

The above-named plaintiff, by its counsel duly authorized in the premises, hereby stipulates and agrees that the foregoing action may be dismissed with prejudice, and at plaintiff's costs.

CARMI A. THOMPSON,
ORVILLE SMITH,
JOSEPH B. SHEPLER,
Attorneys for Plaintiff,
2104 Terminal Tower Building,
Cleveland, Ohio.

June ....., 1933.

---

253 Exhibit "D".

Stipulation.

United States Board Of Tax Appeals.

International Lumber Company, 1100 Builders Exchange Bldg., Minneapolis, Minnesota, Petitioner,

Docket No. 41834. vs.

Commissioner Of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of

record, that the following is a statement of the tax liabil of Minnesota and Ontario Paper Company and its affiliat corporations for the year 1923:

Tax assessed and paid	—	$166,352.88
Tax Liability	—	136,925.19
Overpayment for 1923	—	$ 29,427.69

It is further stipulated and agreed that the Board ma enter its order of redetermination in accordance with th stipulation.

CARMI A. THOMPSON,
ORVILLE SMITH,
Counsel for Petitione

....,
Counsel for Respondent

---

254 Exhibit "E".

Stipulation.

United States Board Of Tax Appeals.

Minnesota and Ontario Paper Company, 1100 Builders Exchange Bldg., Minneapolis, Minnesota, Petitioner,
Docket No. 52110. vs.
Commissioner Of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between th parties hereto, by and through their respective attorneys of record, that the following is a statement of the tax liability of this petitioner and its affiliated companies for the yea 1924:

Tax assessed and paid	—	$70,926.94
Tax liability	—	47,022.71
Overpayment for 1924	—	$23,904.23

It is further stipulated and agreed that the Board ma enter its order of redetermination in accordance with thi stipulation.

CARMI A. THOMPSON,
ORVILLE SMITH,
Counsel for Petitioner

....,
Counsel for Respondent

---

255 Exhibit "F".

Stipulation.

United States Board of Tax Appeals.

Minnesota And Ontario Paper Company, 1100 Builders Exchange Bldg., Minneapolis, Minnesota, Petitioner,
Docket No. 51134. vs.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following is a statement of the tax liability of this petitioner and its affiliated companies for the year 1923.

Tax assessed and paid	—	$9,365.77
Corrected tax	—	1,565.77
Overpayment	—	$7,800.00

It is further stipulated and agreed that the Board may enter its order of redetermination in accordance with this stipulation.

CARMI A. THOMPSON,
ORVILLE SMITH,
Counsel for Petitioner.

.....
Counsel for Respondent.

256 Exhibit "G".

June ....., 1933.

Commissioner of Internal Revenue,
Washington, D. C.

Dear Sir:

Referring to the Final Closing Agreement (From 866-CR) executed by the undersigned and other parties and submitted herewith,—the undersigned hereby stipulate and agree that there have been withheld by the Minnesota and Ontario Paper Company, income taxes for the holders of bonds of said company to whom said company has paid interest on its tax-free covenant bonds, in the following amounts:

For 1930	—	$17,933.21
For 1931	—	1,947.94
Total	—	$19,881.15

The undersigned receivers hereby admit liability therefor and consent to the payment thereof, with interest at six per

cent. (6%) from the respective due dates thereof,—such payment to be made by the application of credit thereto of an equal amount of overpayments of income taxes by the Minnesota and Ontario Paper Company for the taxable years 1922 to 1925, both inclusive.

C. T. JAFFRAY and R. H. M. ROBINSON,
Receivers for the Minnesota and Ontario Paper Company.

---

257 Exhibit "H".

Stipulation For Dismissal.

In the Court of Claims of the United States.

Minnesota And Ontario Paper Company, 1100 Builders Exchange Bldg., Minneapolis, Minnesota, Plaintiff,
Docket No. K-436. vs.
United States of America, Respondent.

The above-named plaintiff, by its counsel duly authorized in the premises, hereby stipulates and agrees that the foregoing action may be dismissed with prejudice, and at plaintiff's costs.

THOMPSON AND SMITH,
Attorneys for Plaintiff,
2104 Terminal Tower Bldg.,
Cleveland, Ohio.

June ....., 1933.

---

258 Exhibit "I".

Stipulation for Dismissal.

In the Court of Claims of the United States.

International Lumber Company, 1100 Builders Exchange Bldg., Minneapolis, Minnesota, Plaintiff,
Docket No. K-437. vs.
United States of America, Respondent.

The above-named plaintiff, by its counsel duly authorized in the premises, hereby stipulates and agrees that the foregoing action may be dismissed with prejudice, and at plaintiff's costs.

THOMPSON AND SMITH,
Attorneys for Plaintiff,
2104 Terminal Tower Bldg.,
Cleveland, Ohio.

June ....., 1933.

---

259 Exhibit N.

Order Authorizing Receivers to Enter Into an Agreement With the Commissioner of Internal Revenue Relating to Income Tax Liability of the Defendant Company and of Certain of its Subsidiaries.

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

Wirt Wilson & Company, a corporation, Complainant,
No. 1950. vs. Equity.
Order No. 102.
Minnesota And Ontario Paper Company, a corporation, Defendant.

Messrs. C. T. Jaffray and R. H. M. Robinson, as Receivers of Minnesota and Ontario Paper Company, the defendant above named, having made and filed in these proceedings their verified petition for order authorizing said Receivers to enter into an agreement with the Commissioner of Internal Revenue relating to income tax liability of the defendant Company and of certain of its subsidiaries, and the Court having read and considered said petition and being fully advised in the premises, and on motion of counsel for the Receivers,

It Is Hereby Ordered That said Receivers be and they are hereby authorized and empowered to execute and deliver those certain documents of which Exhibits "B" and "G" hereto attached are copies, and to cause to be ex-
260 ecuted in their behalf by their attorneys in said matters, and in behalf of Minnesota and Ontario Paper Company those certain documents of which Exhibits "C", "E", "F" and "H" hereto attached are copies, and to cause the execution and delivery by and in behalf of the several subsidiary companies of that certain document hereto attached marked Exhibit "B", and to cause to be executed by the attorneys for International Lumber Company, those certain documents of which Exhibits "D" and "I" hereto attached are copies. The foregoing authorization to said Receivers is subject to the conditions, First, that in computing interest on overpayments of income taxes for the years 1922 to 1925, inclusive, and on deficiencies in income taxes for the years 1926 to 1928, inclusive, resulting from the execution of said Exhibit "B", and in computing interest on the liability for withholding taxes for 1930 and 1931, mentioned in said Exhibit "G", such interest shall be uniformly computed

at the rate of six (6) per cent per annum on the principal amounts of said overpayments and deficiencies, and not at the rate of twelve (12) per cent per annum, as stated in the intervening complaint filed by the Collector of Internal Revenue at St. Paul, Minnesota, a copy of which is hereto attached marked Exhibit "A"; Second, that said Collector in behalf of the Commissioner of Internal Revenue, shall cause to be filed in these proceedings a dismissal of said intervening complaint; Third, that none of said documents (Exhibits "B" to "I" inclusive) hereinabove referred to, shall become effective except upon condition that each and all of said documents become effective at the same time.

It Is Further Ordered that said Receivers be and they hereby are authorized and empowered to execute and deliver such further and additional agreements and stipula-
261 tions, if any, as in the judgment of your Receivers may be or become necessary or advisable to deal with the matters herein referred to, including the right to make such modifications or amendments of the terms and provisions of the several Exhibits attached hereto as may in their judgment be necessary in the consummation of the matters hereinabove referred to.

Dated this 10th day of June, 1933.

By The Court:

JOSEPH W. MOLYNEAUX,
Judge.

---

262 Exhibit O.

Treasury Department
Internal Revenue Service
Form 866-CR
GC:R:ECH—C1—6413

Agreement as to Final Determination of Tax Liability

This Agreement, Made in Duplicate under and in pursuance of Section 606 of the Revenue Act of 1928, by and between

Name and Address	State of Incorporation	Period
Minnesota & Ontario Paper Company 1100 Builders Exchange Minneapolis, Minnesota.	Maine	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Falls Lumber & Coal Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928

International Insulation Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927, 1928
International Lumber Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927, 1928
Minnesota, Dakota & Western Railway Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Minnesota Forest Products Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Rainy River Improvement Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928
Watrous Island Boom Company 1100 Builders Exchange, Minneapolis, Minnesota.	Minnesota	Calendar years 1922, 1923, 1924, 1925, 1926, 1927 and 1928

taxpayers affiliated under Section 240 of the Revenue Acts of 1921, 1924 and 1926 and Section 142 of the Revenue Act of 1928, having their principal places of business at the address shown above and the Commissioner of Internal Revenue:

Whereas, there has been a determination of the tax liability of said taxpayers in respect of Income Tax imposed by the Revenue Acts of 1921, 1924, 1926 and 1928, for each taxable period stated above falling under the provisions of those acts in the sum of

$ 17,500.00 for the calendar year 1922,
$136,925.19 for the calendar year 1923,
$ 47,022.71 for the calendar year 1924,
$ 1,565.77 for the calendar year 1925,
$ 33,565.47 for the calendar year 1926,
$ 38,965.14 for the calendar year 1927, and
263 $ 20,533.10 for the calendar year 1928.

exclusive of any penalty or interest applicable thereto as provided by law:

Now, this agreement witnesseth, that said taxpayers and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if this Agreement is approved by the Secretary of the Treasury, or the Under Secretary within one year from the date this Agreement is signed by said taxpayers.

Reserving, However, to the taxpayers the right to contest the disallowance of the deduction claimed for the year 1926 in the amount of $790,455.20, which amount was paid, on March 22, 1926, to the United States Government in connection with the payment of additional Federal income, war-profits and excess-profits taxes for the calendar years 1917 to 1920, inclusive, and which amount the taxpayers contend was deductible as interest on deficiencies in taxes, and/or was deductible as a penalty, which contentions the Government denies, and reserving to the taxpayers the right to any benefit from the reduction in Federal Income taxes, for the years 1926, 1927 and 1928, that will result in the event of a final conclusion of the issues favorable to the taxpayers.

Reserving also to the taxpayers expressly any and all rights which might hereafter accrue to them under Section 1107 of the Revenue Act of 1932 or any similar provision hereafter enacted, and it is stipulated that the execution hereof shall not preclude the taxpayers from recovering any refunds specified thereunder,—said Section 1107 relating to payments under Section 15 a of Interstate Commerce Act.

Provided also that nothing in this agreement shall be determinative of the liability of the Minnesota & Ontario Paper Company for the taxes provided in Section 237 of the Revenue Acts of 1921, 1924, and 1926 on account of interest paid by that company to the Fort Frances Pulp and Paper Company, Limited, a Canadian Corporation, Fort Frances, Ontario.

In Witness Whereof, the Commissioner and the undersigned corporations have subscribed their names to these presents in duplicate.

Signed this 12 day of June, 1933.

(Seal)

MINNESOTA AND ONTARIO
PAPER COMPANY,
(Parent)

By C. T. Jaffray,

C. T. Jaffray,

By R. H. M. Robinson,

R. H. M. Robinson,

By .....,

Receivers.

Signed this 12 day of June, 1933.

(Seal)

FALLS LUMBER & COAL COMPANY,
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By C. S. Pope, Secretary.
(Signature and Title)

Signed this 12 day of June, 1933.

264 (Seal)

THE INSULITE COMPANY, formerly the International Insulation Company.
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By C. S. Pope, Secretary.
(Signature and Title)

Signed this 12 day of June, 1933.

(Seal)

INTERNATIONAL LUMBER COMPANY,
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By C. S. Pope, Secretary.
(Signature and Title)

Signed this 12 day of June, 1933.

(Seal)

MINNESOTA, DAKOTA & WESTERN RAILWAY COMPANY,
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By A. A. Figen, Secretary.
(Signature and Title)

Signed this 12 day of June, 1933.

(Seal)

MINNESOTA FOREST PRODUCTS COMPANY,
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By C. S. Pope, Secretary.
(Signature and Title)

Signed this 12 day of June, 1933.

(Seal)

RAINY RIVER IMPROVEMENT COMPANY,
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By C. S. Pope, Secretary.
(Signature and Title)

265

Signed this 12 day of June, 1933.

(Seal)

WATROUS ISLAND BOOM COMPANY,
(Subsidiary)
By R. H. M. Robinson, Vice President.
(Signature and Title)
By C. S. Pope, Secretary.
(Signature and Title)

Signed this 7 day of July, 1933.

GUY T. HELVERING,
Commissioner of Internal Revenue.

The above agreement has been approved by the Secretary of the Treasury, or the Under Secretary, in accordance with the provisions of Section 606 of the Revenue Act of 1928, the approval being specifically enumerated on Schedule No. 6829.

Dated Jul. 7, 1933.

TREASURY DEPARTMENT

OFFICE OF

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

INCOME TAX UNIT

IT:R:D-7
VED

CERTIFICATE OF OVERASSESSMENT

Number: 2011190

Allowed: $49,318.77

Schedule No. 50519

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Reg. ltr. filed 6/4/27

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1926 indicates that the tax assessed for that year was in excess of the amount due:

Income tax assessed:

Original, June 1927, #400074	$66,818.77
Correct income tax liability	None
Overassessment	$66,818.77
Barred by statute of limitations	17,500.00
Overassessment allowable	$49,318.77

(See page 2 attached)

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

~~Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.~~

By direction of the Deputy Commissioner:

Respectfully,

Abated: $ 42,884.00

Credited: $ Addtl. 1926
To Tax. Year

6,434.77

Credited: $ Addtl. 1927
To Tax. Year

Tent. Int.
Credited: $24,034.76
To Tax. Year Addtl. 1921

Refunded: $

Interest: $

(Signed) H. H. ROBINSON
Head of Division.

ves-3

Exhibit P

GENERAL ACCOUNTING OFFICE COPY

Form 7776 A Form approved by Comptroller General, U. S. Oct. 25, 1926.

a 6 (4)

256

-2-

C. T. Jaffray and R. H. M. Robinson,
Receivers.

CERTIFICATE OF OVERASSESSMENT.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

In the determination of this overassessment the grounds set forth in your claim for refund of $66,818.77 have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1105(a) of the Revenue Act of 1932.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

Exhibit P

ves-3

257

a-7

EXHIBIT P.

219

Schedule 07-7 C. T. Jaffray & R. H. M. Robinson, receivers Tax Year
FT-A-4 50519 for Minnesota & Ontario Power Co., (Name of taxpayer) 1922

423

RECORD OF ASSESSMENTS AND PAYMENTS

Entries to be made by the Collector according to instructions. Show, in the ninth column, by symbols "Pd.", "Ab." or "Cr.", the nature of each entry in the eighth column.

Character of assessment and period covered	List	Year	Month	Assessment No. or Page	Assessment No. or Line	Amount assessed	Paid, Abated, or Credited Date	Paid, Abated, or Credited Amount	Pd. Ab. Cr.
INCOME TAX Corp.	1923		June	Jn400074		$ 66818 77	3/15-23	$ 17500 00	Pd.
							6/16-23	15909 39	Pd.
							9/15-23	16704 70	Pd.
							12/15-23	16704 68	Pd.
Tents. Int. Cr. as below.									
					Total.	$ 66818 77		Total. 66818 77	

Date of ~~refund~~ tax due any taxable year to which overpayment was applied as a credit.

Credited to Year 19 21

List	Year	Month	Assessment No. or Page	Assessment No. or Line	Amount credited	Due date
1933		July Spec	82	00C	$ 24034 76	7/10-33

Due date of additional tax ~~refunded~~ to which overpayment was applied as a credit

Credited to Year 19 26

List	Year	Month	Assessment No. or Page	Assessment No. or Line	Amount credited	Due date
1931		Oct.	85	10C	$ 42884 00	10/31-31

Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19 27

List	Year	Month	Assessment No. or Page	Assessment No. or Line	Amount credited	Date of assessment
1931		Oct.	85	11C	$ 6334 77	10/31-31

I CERTIFY that the records of this office are as given above; that I have caused to be prepared on Form 7776 B the full, true, and correct transcript of all accounts of the taxpayer as required by instructions thereon; and that the amounts have been allowed, credited, or certified for refund as shown on the reverse of this form.

L. M. Gillette By Florence Baechler
Collector of Internal Revenue. Deputy Collector.

INTEREST ALLOWANCE (Entries and to be made by the Collector)	$ 1590.39	$ 1670.70	$ 1670.68		
	$ 50246.57	$ 48763.01	$ 47763.01		

Items	Year	Month	Day	Year	Month	Day	Year	Month	Day	Year	Month	Day
1. Date to which interest was computed												
2. Date additional tax assessed	31	10	31	31	10	31	31	10	31			
3. Payment of tax	23	6	16	23	9	15	23	12	15			
4. Interest period	8	4	15	8	1	16	7	10	16			
	$ 703	92		$ 815.71			$ 785	19				

TREASURY DEPARTMENT

OFFICE OF

COMMISSIONER OF INTERNAL REVENUE

WASHINGTON

INCOME TAX UNIT

2243

EXHIBIT Q.

IT:AR:D-7
SED

CERTIFICATE OF OVERASSESSMENT

Number 3014378

Allowed: $29,427.69

Schedule No.

C. T. Jaffray and E. H. H. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

50519 27

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1923 indicates that the tax assessed for that year was in excess of the amount due:

Income tax assessed:	
Original, June 1924, $400066	$166,362.88
Correct income tax liability	136,935.19
Overassessment	$ 29,427.69

Pay as found 7-24-27

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

In the determination of this overassessment the grounds set forth in your claim for refund of $110,241.61, and your two claims for refund of $86,356.86, each, have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

The overassessment shown herein is in accordance with a recommendation by the General Counsel as the result of a settlement agreement between that office and the taxpayer and is in full settlement of both tax and interest.

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

~~Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.~~

By direction of the Deputy Commissioner:

Respectfully,

(Signed) W. [illegible]

Head of Division.

Abated: $

Credited: $ 29,427.69
To Tax. Year Addtl. 1927

Trust, Int.
Credited: $ 1,235.60
To Tax. Year Addtl. 1921

Trust Fund.
Credited: $ 10,907.06
To Tax. Year 1922

Refunded: $

Interest: $

Enclosure

GENERAL ACCOUNTING OFFICE COPY

259

R-9(4)

Form 7776-A - Form ... [illegible] Comptroller General, U. S. Oct. 20, 1926.

FT-A-4 50519 "Innesota & Ontario Paper Co. (Name of taxpayer) , 19 33

RECORD OF ASSESSMENTS AND PAYMENTS

Entries to be made by the Collector according to instructions. Show, in the ninth column, by symbols "Pd.", "Ab." or "Cr.", the nature of each entry in the eighth column.

Character assessed and period covered	List	Year	Month	Account No. Page	Account No. Line	Amount assessed	Paid, Abated, or Credited Date	Paid, Abated, or Credited Amount	Pd. Ab. Cr.
INCOME TAX Corp.	1924		June	In400056		$ 166352 88	3/15-24	$ 58000 00	Pd.
							6/16-24	25176 44	Pd.
							9/15-24	41588 22	Pd.
							12/15-24	41588 22	Pd.
Tent. Int. Cr. to Addtl. for 1921 & 1922						Total. $ 166352 88		Total. $ 166352 88	

Due date of additional tax (for any taxable year) to which overpayment was applied as a credit.

Credited to Year 19 21

List	Year	Month	Account No. Page	Account No. Line	Amount credited	Due date
1933	July	Spec.	$13	00C	$ 1235 69	7/10-33

Due date of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19 22

List	Year	Month	Account No. Page	Account No. Line	Amount credited	Due date
1933	July	Spec.	$1	-01C	$ 10907 06	7/10-33

Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19 27

List	Year	Month	Account No. Page	Account No. Line	Amount credited	Date of assessment
1931		Oct.	$5	11C	$ 29427 69	10/31-31

I CERTIFY that the records of this office are as given above; that I have caused to be prepared on Form 7776-B the full, true, and correct transcript of all accounts of the taxpayer as required by instructions thereon; and that the amounts have been abated, credited, or certified for refund as shown on the reverse of this form.

L. H. Willcutt
Collector of Internal Revenue.

By Florence Buechler
Deputy Collector.

INTEREST ALLOWANCE (Entries not to be made by the Collector)

$ 29427.69
$ 1716.01

Date		Year	Month	Day	Year	Month	Day	Year	Month	Day	Year	Month	Day
1. Date to which interest was computed													
2. Date additional tax assessed		31	10	31									
3. Payment of tax		24	12	15									
4. Interest period		6	10	16									
5. Interest allowance	$				$			$					
6. Total interest	$	1242	75										

Date of computation Exhibit 7/7/33

270

TREASURY DEPARTMENT
OFFICE OF
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON

EXHIBIT R.

277

IT:AR:D-7
NED

CERTIFICATE OF OVERASSESSMENT

Number: 2030108

Allowed: $ 80,680.88

Schedule No. 50519

Mr. C. T. Jaffray and Mr. R. H. H. Robinson,
Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

An audit of your income tax return, Form 1120 and a consideration of all the claims (if any) filed by you for the calendar year 1926 indicates that the tax assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original account, June. #400180	$70,926.94	
Additional, June 6, 1931, list #1, page 2, line 0	41,851.55	$14,684.77
Total assessed	$112,778.49	$14,684.77
Correct income tax liability	47,032.71	None
Overassessment	$ 65,745.78	$14,684.77

In the determination of this overassessment the grounds set forth in your claims for refund of $36,904.60, $29,883.76, and $49,670.56 have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1103(a) of the Revenue Act of 1932.

(See page 2 attached.)

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

~~Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.~~

By direction of the Deputy Commissioner:
Respectfully,

(Signed) H. H. ROBINSON
Head of Division.

Abated: $ 56,546.22
Credited: $ 11,582.66
To Tax. Year Addtl. 1927

Credited: $ 12,321.87
To Tax. Year Addtl. 1928

Treas. Int.
Credited: $8,821.94
To. Tax. Year Addtl. 1922

Refunded: $
Interest: $

Exhibit R
277

GENERAL ACCOUNTING OFFICE COPY

a-1019

Rej. & filed 12/24/37

IT-A-4 50519 Minnesota & Ontario Paper Co. , 19 24

RECORD OF ASSESSMENTS AND PAYMENTS

329

Entries to be made by the Collector according to instructions. Show, in the sixth column, by symbols "Pd.", "Ab." or "Cr.", the nature of each entry in the eighth column.

Character of assessment and period covered	List	Year	Month	Assessment No. 64 Page	Assessment No. 64 Line	Amount assessed	Paid, Abated, or Credited — Date	Paid, Abated, or Credited — Amount	Pd. Ab. Cr.
INCOME TAX Corp.	1925		June	Jn400150		$ 70926 94	3/16-25	$ 15000 00	Pd.
					Int.	30 97	6/18-25	20463 47	Pd.
							6/26-25	30 97	Pd.
							9/15-25	17731 74	Pd.
							12/15-25	17731 73	Pd.
	1931		June	#1	20C	41851 55	Being	56546 32	11 Sep 19
					Int.	14694 77	abated		
Tent. int .Cr. to addtl. 1932					Total.	$ 127504 23		Total. $ 127504 23	

Due date of tax (for any taxable year) to which overpayment was applied as a credit.

Credited to Year 19 22

List	Year	Month	Assessment No. 64 Page	Assessment No. 64 Line	Amount credited	Due date
1933	July	Spec.	#1	01C	$ 8521 94	7/10-33

Due date of additional tax (for any taxable year) to which overpayment was applied as a credit.

Credited to Year 19 27

List	Year	Month	Assessment No. 64 Page	Assessment No. 64 Line	Amount credited	Due date
1931		Oct.	#5	11C	$ 11582 66	10/31-31

Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19 28

List	Year	Month	Assessment No. 64 Page	Assessment No. 64 Line	Amount credited	Date of assessment
1931		Oct.	#5	12C	$ 12321 57	10/31-31

I CERTIFY that the records of this office are as given above; that I have caused to be prepared on Form 2776 H a full, true, and correct transcript of all accounts of the taxpayer as required by instructions thereon; and that the amounts have been abated, credited or certified for refund as shown on the reverse of this form.

L. M. Willcuts, Collector of Internal Revenue. By Florence Baechler, Deputy Collector

INTEREST ALLOWANCE (Entries not to be made by the Collector)

Items												
	$ 6172.50			$ 17731.73			$			$		
	.367630			.3526301								
	Year	Month	Day	Year	Month	Day	Year	Month	Day	Year	Month	Day
1. Date to which interest was computed												
2. Date additional tax assessed	31	10	31	31	10	31						
3. Payment of tax	25	9	15	25	12	15						
4. Interest period	6	1	16	5	10	16						
5. Interest allowance	$ 2269	20		$ 6252	74		$					
6. Total interest assessed	$ 8521	94										

Date of computation: Claim R 8/9/33 D.I.W.

272 Internal Revenue

TREASURY DEPARTMENT
OFFICE OF
COMMISSIONER OF INTERNAL REVENUE
WASHINGTON

INCOME TAX UNIT

IT:AR:B-7
WED

CERTIFICATE OF OVERASSESSMENT

Number: 2029728

Allowed: $ 12,193.99

Schedule No. 50519

C. T. Jaffray and R.H.M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

Sirs:

Suppl

An audit of your income tax return, Form 1120
and a consideration of all the claims (if any) filed by you for the
calendar year 1926 indicates that the tax
assessed for that year was in excess of the amount due:

	Income Tax	Interest
Income tax assessed:		
Original, June 1926, $490,220	$ 9,366.77	
Additional, June 6, 1931, list #1, page 2, line 1	3,344.96	$1,049.03
Total assessed	$12,710.73	$1,049.03
Correct income tax liability	1,565.77	None
Overassessment	$11,144.96	$1,049.03

Rejected filed 10/24/27

(See page 3, attached)

JBW-3

The amount of the overassessment will be abated, credited, or refunded as indicated below. (You will be relieved from the payment of any amount abated; if an overpayment has been made and other taxes are due, credit will be made accordingly, and any amount refundable is covered by a Treasury check transmitted herewith.)

~~Included in the accompanying check is interest in the amount stated below, allowed on the refund or credit.~~

By direction of the Deputy Commissioner:
Respectfully,

(Signed) H H ROBINSON
Head of Division.

Abated: $4,325.99
Credited: $8,861.44
To Tax. Year Addtl. 1921

Credited: $1,948.56
To Tax. Year Addtl. 1928

Refunded: $
Interest: $

Test. Int.
Credited: $2,831.25
To Tax. Year Addtl. 1922

Addl. Int.
Credited: $396.08
To Tax. Year Addtl. 1922

Exhibit S
p.

GENERAL ACCOUNTING OFFICE COPY

a-12

- 2 -

C. T. Jaffray and R.H.M. Robinson, Receivers, Minnesota and Ontario Paper Company. CERTIFICATE OF OVERASSESSMENT.

The portion of this overassessment which represents an overpayment, if any, is refunded or credited in accordance with the provisions of section 284(b) of the Revenue Act of 1926.

In the determination of this overassessment the grounds set forth in your claims for refund of $8,815.30, $6,401.49, and $5,400.75, have been given careful consideration and to the extent disallowed, official notice will be issued by registered mail in accordance with section 1105(a) of the Revenue Act of 1932.

This overassessment is in accordance with the decision of the United States Board of Tax Appeals dated June 22, 1933, Docket #61134.

Exhibit S

JBW-3

271

a-13

EXHIBIT S.

231

Tennessee & Ontario Paper Co. , 19 25.
(Name of taxpayer)

RECORD OF ASSESSMENTS AND PAYMENTS

233

Entries to be made by the Collector according to instructions. Show, in the ninth column, by symbols "Pd.", "Ab." or "Cr.", the nature of each entry in the eighth column.

Character of assessment and period covered	List	Year	Month	Assessment No. or Page	Assessment No. or Line	Amount assessed	Paid, Abated, or Credited: Date	Paid, Abated, or Credited: Amount	Pd. Ab. Cr.
INCOME TAX									
Cont.		1926	June	Jn400220		$ 9365 77	3/15-26	$ 10000 00	Pd.
					Cr.	634 23	Trf. to ex. coll		& Pd by
						ck #1022809	dated 10/14-26		
		1931	June	#1 210		3344 96	Being abated	4393 99	F50519
					Int.	1049 03			
(Tent. int.cr. to addtl. 1922) addtl.									
					Total.	$ 14393 99	Total.	$ 14393 99	

Due date of ~~assessment~~ (of any taxable year) to which overpayment was applied as a credit.

Credited to Year 19 22

List	Year	Month	Assessment No. or Page	Assessment No. or Line
1933	July	Spec.	#1-000	

Amount credited	Due date
$ 2831 25	7/10-33
996 06	7/10/33 Int. on Suppl. 50519

Due date of additional tax (~~KIND OF TAX~~) to which overpayment was applied as a credit.

Credited to Year 19 21

List	Year	Month	Assessment No. or Page	Assessment No. or Line
1933	July	Spec.	#1-000	

Amount credited	Due date
$ 5851 44	7/10-33

Date of assessment of additional tax (1921 and later years) to which overpayment was applied as a credit.

Credited to Year 19 28

List	Year	Month	Assessment No. or Page	Assessment No. or Line
1931		Oct.	#5	120

Amount credited	Date of assessment
$ 1948 56	10/31-31

I CERTIFY that the records of this office are as given above; that I have caused to be prepared on Form 7776 B the full, true, and correct transcript of all accounts of the taxpayer as required by instructions thereon; and that the amounts have been abated, credited, or certified for refund as shown on the reverse of this form.

L. M. Willcutts — Collector of Internal Revenue. By Florence Baechler — Deputy Collector.

INTEREST ALLOWANCE (Entries not to be made by the Collector)	$ 1948.56	$ 5851.44	$	$
	.337690	.439109		

Item	Year	Month	Day	Year	Month	Day	Year	Month	Day	Year	Month	Day
1. Date to which interest was computed												
2. Date additional tax assessed	31	10	31	33	7	10						
3. Payment of tax	26	3	15	26	3	15						
4. Interest period	5	7	16	7	3	25						
5. Interest allowance	3377	81		2569	42							
6. Total interest	$ 2371 25											

Date of computation 7/26/33

E.T.W.J. Interest Examiner.

Exhibit D

$96.06

332

EXHIB

To Comptroller General AUG 12 1933
List 5218

Form 2778
TREASURY DEPARTMENT
U. S. INTERNAL REVENUE BUREAU
Form approved by Comptroller General U. S.
September 21, 1929

SCHEDULE OF OVERASSESSMENTS

ABATEMENTS, CREDITS, AND REFUNDS

INCOME TAX UNIT

Schedule No. IT- 50519

Sheet 1 of

District of MINNESOTA

Disbursing Clerk Voucher No.

CERTIFICATE OF DEPUTY COMMISSIONER

To the Commissioner of Internal Revenue:

The tax liability of the respective taxpayers herein listed has been determined in accordance with applicable laws and the law. The overassessments or reductions of tax liability indicated in column 3, or amounts refundable listed in column 7, are accordingly recommended for allowance.

Date JUL 13 1933

Elmer J. Russell
Deputy Commissioner.

AUTHORIZATION OF COMMISSIONER

This schedule must be adjusted and all required steps taken IMMEDIATELY.

The amounts listed in column 3 as overassessments (or reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.

The COLLECTOR will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part and make such abatements as may be warranted by the condition of the taxpayer's accounts for the years involved. If any part of any such item is found to be an overpayment, the Collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the Collector in column 6. The balance, if any, of the overpayment refundable will be entered in column 7 and an appropriate MEMORANDUM made upon the taxpayer's account showing the refund and the amount refunded. The Collector will thereupon complete and certify this schedule and return the same, with the necessary copies, to the Commissioner of Internal Revenue.

The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.

The DISBURSING CLERK, Treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both.

Date JUL 13 1933

Guy T. Helvering
Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items on this schedule have been checked against the accounts of the respective taxpayers concerned. Abatements and credits in their amounts have been applied in the amounts indicated, and not amounts refundable have been determined as shown in column 7.

Date JUL 20 1933

M. Willcuts
Collector. District of MINNESOTA

Sequence of Items Allowed (a)	Name of Taxpayer (b)	Overassessment or Reduction of Tax Liability (Abated) (c)		Tax Liability Year (d)	(Entries to be made by the Collector) Amount Abated (e)		Amount Credited to Other Taxes Due (f)		Net Amount Refundable (g)	Claims to Journals by the Deputy Commissioner REFUNDING TAXES ILLEGALLY COLLECTED Interest Stopped and Ceased (h)	Amount to be Paid 19___ and Prior Years (i)	Amount to be Paid 19___ (j)	Paid by Disbursing Clerk, Name, Date, or Check Number Disallowed as Refunded (k)		Balance (l)
X X	TOTALS OF 11 ITEMS ON THIS SCHEDULE,			X									X X		X X
1316756	MINNESOTA & ONTARIO PAPER CO	10222	00	26	10222	00									
1316757	MINNESOTA & ONTARIO PAPER CO	13449	44	27	13449	44									
2823612	MINNESOTA & ONTARIO PAPER CO	34543	10	28	34543	10									
2811190	MINNESOTA & ONTARIO PAPER CO	49318	77	22					49318	77					
2814278	MINNESOTA & ONTARIO PAPER CO	29427	69	23					29427	69					
[illegible]	MINNESOTA & ONTARIO PAPER CO	80450	55	24	56586	32			[illegible]						
[illegible]	MINNESOTA & ONTARIO PAPER CO	12193	99	25	4383	99			[illegible]						
					INTEREST										

EXHIBIT T.

Controller General AUG 12 1933

235

5218

Schedule No. IT- 50519

Sheet 1 of _____ sheets

District of MINNESOTA

Disbursing Clerk Voucher No. _____

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items on this schedule have been checked against the accounts of the respective taxpayers concerned. Abatements and credits in their accounts have been applied in the amounts indicated, and no exempt schedules have been determined as shown in column 7.

Date JUL 20 1933

M. Williams

Collector District of MINNESOTA

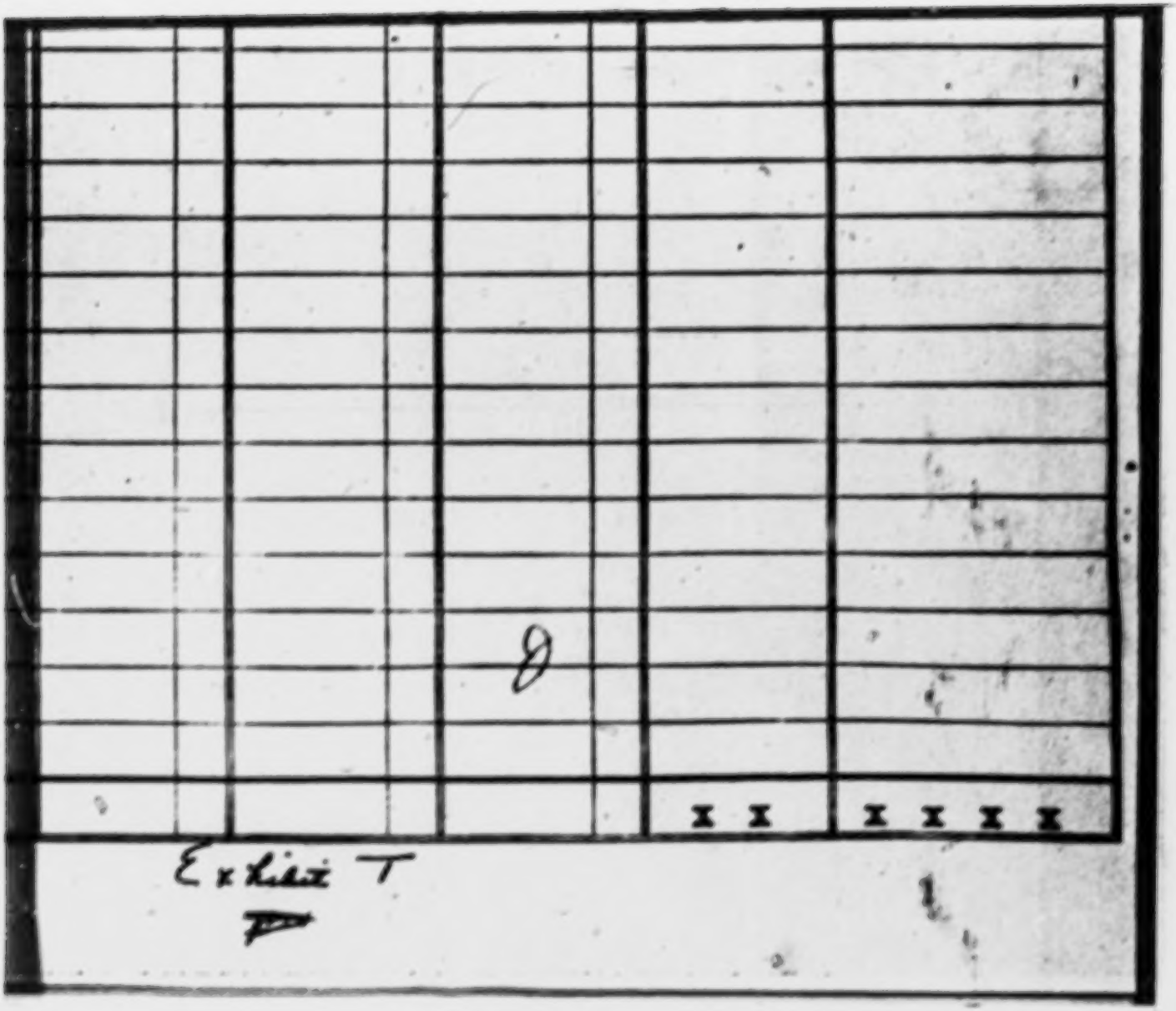
INITIALS	DATE

To be filled in by the Deputy Commissioner) AMOUNT ILLEGALLY COLLECTED				PAID BY DISBURSING CLERK, TREAS. DEPT., BY CHECK DATED _____ NUMBERED AS FOLLOWS (12)	REMARKS (13)
AMOUNT TO BE PAID 19____ PRIOR YEARS (9)		AMOUNT TO BE PAID 19____ (10)			
				X X	X X X X

	MINNESOTA & ONTARIO PAPER CO	12193	99	25	4393	99	7800	00											
		INTEREST ALLOWED					CREDITED												
2011190	MINNESOTA & ONTARIO PAPER CO	24034	76	22			24034	76											
2014278	MINNESOTA & ONTARIO PAPER CO	12142	75	23			12142	75											
2030102	MINNESOTA & ONTARIO PAPER CO	8521	94	24			8521	94											
2029738	MINNESOTA & ONTARIO PAPER CO	1975 855	62 63	25			1975 855	62 63											
X X	PAGE TOTALS ONLY,	27136	24	X	11915	85	157981	39										X X	X X

Exhibit T

a-1


8
X X
X X X X
Exhibit T

To Comptroller General AUG 12 1933

SCHEDULE OF OVERASSESSMENTS

List · 5218

SUPPLEMENTAL Schedule No. IT- 50519

ABATEMENTS, CREDITS, AND REFUNDS

INCOME TAX UNIT

Sheet 1 of

District of MINNESOTA

Disbursing Clerk Voucher No.

AUTHORIZATION OF COMMISSIONER

This schedule must be adjusted and all required steps taken IMMEDIATELY.

The amounts listed in column 5 as overassessments (or reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.

The COLLECTOR will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part and make such abatements as may be warranted by the conditions of the taxpayer's accounts for the years involved. If any part of any such item is found to be an overpayment, the Collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the Collector in column 6. The balance, if any, of the overpayment refundable will be entered in column 7 and an appropriate MEMORANDUM made upon the taxpayer's account showing the refund and the amount refunded. The Collector will thereupon complete and certify this schedule and return the same, with the necessary copies, to the Commissioner of Internal Revenue.

The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.

The DISBURSING CLERK, Treasury Department, is authorized to pay the amounts specified in columns 9 or 10, or both.

Date JUL 28 1933

Chas. D. Russell
Deputy Commissioner

Date JUL 28 1933

Guy T. Helvering
Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items on this schedule have been checked against the records of the respective taxpayers concerned. Abatements and credits in their accounts have been applied in the amounts indicated, and not amounts refundable have been determined as shown in column 7.

Date AUG 4 1933

Joseph Woel
Collector
District of MINNESOTA

Consecutive Numbers	Name of Taxpayer	Overassessment or Reduction of Tax Liability (Abatement)	Tax-able Year	(Entries to be made by the Collector) Amount Abated	Amount Credited to Other Taxes Due	Net Amount Refundable	(Entries to be made by the Disbursing Officer) REFUNDING TAXES ILLEGALLY COLLECTED Interest on Refund and Credit	Amount to be Paid 19___ and Prior Years	Amount to be Paid 19___	Paid on Documentary Claims, Vouch. Sheets, or Checks Issued	Remarks
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
X X	Totals of ____ Items on this Schedule,		X							X X	X X
		INTEREST ALLOWED			CREDITED						
2029738	MINNESOTA AND ONTARIO PAPER CO C T JAFFRAY AND R H M ROBINSON RECEIVERS	396 06	25		396 06						6305

Comptroller General AUG 12 1933

237

5218

SUPPLEMENTAL
Schedule No. IT- 50519

Sheet 1 of _____ sheets

District of MINNESOTA

Disbursing Clerk Voucher No. _____

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue

The items on this schedule have been checked against the warrants of the respective taxpayers concerned. Abatements and credits in this account have been applied in the amounts indicated, and the amounts scheduled have been disbursed as shown in column 7.

INITIALS	DATE

Date AUG 4 1933

Joseph Woel
Collector

District of MINNESOTA

Amount to be Paid 19____ and Prior Years (5)	Amount to be Paid 19____ (6)	Paid or Disposed of by Check, Draft, or Certificate of Deposit as Follows (7)	REMARKS (8)
		X X	X X X X
			670 Angle Rest Qt. M. Wheat

To Comptroller General AUG 12 1933

List · 5218

SCHEDULE OF OVERASSESSMENTS

ABATEMENTS, CREDITS, AND REFUNDS

INCOME TAX UNIT

SUPPLEMENTAL Schedule No. IT- 50519

Sheet 1 of

District of MINNESOTA

Disbursing Clerk Voucher No.

CERTIFICATE OF DEPUTY COMMISSIONER

To the Commissioner of Internal Revenue:

The tax liability of the respective taxpayers hereto listed has been determined in accordance with applicable laws and the laws. The overassessments or reductions of tax liability indicated in column 3, or amounts refundable, listed in column 7, are accordingly recommended for allowance.

Date JUL 28 1933

Chas. J. Russell
Deputy Commissioner

AUTHORIZATION OF COMMISSIONER

This schedule must be adjusted and all required steps taken IMMEDIATELY.

The amounts listed in column 3 as overassessments (or reductions of tax liability) are hereby approved and allowed in the respective amounts indicated, if any.

The COLLECTOR will immediately check such items against the accounts of the taxpayers and determine whether the amounts in which the tax liabilities have been reduced should be respectively abated in whole or in part and make such abatements as may be warranted by the condition of the taxpayer's accounts for the years involved. If any part of any such item is found to be an overpayment, the Collector will examine all accounts of the taxpayer for other periods and apply the overpayment as a credit against income, war profits, or excess profits taxes due, if any, making the appropriate entries in his accounts. The amounts credited will be entered by the Collector in column 6. The balance, if any, of the overpayment refundable will be entered in column 7 and an appropriate MEMORANDUM made upon the taxpayer's account showing the refund and the amount refunded. The Collector will thereupon complete and certify this schedule and return the same, with the necessary copies, to the Commissioner of Internal Revenue.

The DEPUTY COMMISSIONER of Internal Revenue will compute the interest payable, list the same in column 8, and enter the respective total amounts payable in column 9 or 10, or both.

The DISBURSING CLERK, Treasury Department, is authorized to pay the amounts specified in column 9 or 10, or both.

Date JUL 28 1933

Guy T. Helvering
Commissioner of Internal Revenue.

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items on this schedule have been checked against the accounts of the respective taxpayers concerned. Abatements and credits in their accounts have been applied in the amounts indicated, and not claimed refundable have been disallowed as shown in column 7.

Date AUG 4 1933

Joseph Woel
Collector, District of MINNESOTA

Certificate of Overassessment Number (1)	Name of Taxpayer (2)	Overassessment or Reduction of Tax Liability (Amount) (3)	Taxable Year (4)	(Entries to be made by the Collector) Amount Abated (5)	Amount Credited to Other Taxes Due (6)	Net Amount Refundable (7)	(Entries to be made by the Deputy Commissioner) REFUNDING TAXES ILLEGALLY COLLECTED Interest Refund and Credit (8)	Amount to be Paid 19____ and Prior Years (9)	Amount to be Paid 19____ (10)	Paid by Disbursing Clerk, Treas. Dept., by Check Dated Number and Amount (11)	Remarks (12)
X X	Totals of _____ Items on this Schedule,		X							X X	X X
		INTEREST ALLOWED			CREDITED						
2029738	MINNESOTA AND ONTARIO PAPER CO C T JAFFRAY AND R H M ROBINSON RECEIVERS	396 06 25			396 06						6070 Receipt

Comptroller General AUG 12 1933

237

E · 5213

SUPPLEMENTAL
Schedule No. IT- 50519

Sheet 1 of _____ sheets

_____ District of MINNESOTA

Disbursing Clerk Voucher No. _____

actively
payment,
ction is
ed made
ollector

CERTIFICATE OF COLLECTOR

To the Commissioner of Internal Revenue:

The items on this schedule have been checked against the accounts of the respective taxpayers concerned. Abatements and credits in their accounts have been applied in the amounts indicated, and net amounts refundable have been determined as shown in column 7.

INITIALS	DATE

Date AUG 4 1933

Helvering

Joseph Woel

Collector District of MINNESOTA

be made by the Deputy Commissioner) D TAXES ILLEGALLY COLLECTED				Paid by Treasurer's Check, Treas. Draft, or Certified Draft	REMARKS
AMOUNT TO BE PAID 19_____ AND PRIOR YEARS (5)		AMOUNT TO BE PAID 19_____ (6)		Withheld as follows: (9)	(10)
				X X	X X X X
					6 of 0 withheld by asst Pat. Mullett

277

Exhibit U.

Treasury Department
Washington.

Office of
Commissioner of Internal
Revenue

Aug. 31, 1933.

Address Reply to
Commissioner of Internal
Revenue and refer to
IT:C:CC—4
CCP

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

In Re: Refund Claims for years: 1922, 1923, 1924.
Amounts: $66,818.77, $110,241.81,
$86,355.86 (2) $36,904.69, $29,882.76
and $49,670.56.

Sirs:

In accordance with the provisions of Section 3226, Revised Statutes, as amended, and as further amended by Section 1103 of the Revenue Act of 1932, you are hereby notified that your claims for refund of taxes were disallowed to the extent indicated in certificates of overassessment numbered 2011190, 2014278, 2030102, on a schedule dated July 13, 1933.

By direction of the Commissioner:

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.
By T. F. Langley,
Head of Division.

278 Exhibit V.

Treasury Department
Washington.

Office of
Commissioner of
Internal Revenue

Aug. 31, 1933.

Address Reply to
Commissioner of Internal
Revenue and refer to
IT:C:CC-4
CCP

C. T. Jaffray and R. H. M. Robinson, Receivers,
Minnesota and Ontario Paper Company,
1100 Builders Exchange Building,
Minneapolis, Minnesota.

In Re: Refund Claims for years: 1925, 1928,
Amounts: $8,815.30, $6,401.49,
$3,400.75 and $7,758.58.

Sirs:

In accordance with the provisions of Section 3226, Revised Statutes, as amended, and as further amended by Section 1103 of the Revenue Act of 1932, you are hereby notified that your claims for refund of taxes were disallowed to the extent indicated in certificates of overassessment numbered 2029738, 2223612, on a schedule dated July 13, 1933.

By direction of the Commissioner:

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.
By T. F. Langley,
Head of Division.

Exhibit Q

Form 1040—Revised January, 1921
UNITED STATES INTERNAL REVENUE SERVICE

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS HAVING NO OFFICE OR PLACE OF BUSINESS IN THE UNITED STATES, AND CORPORATIONS (NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND NOT HAVING ANY OFFICE OR PLACE OF BUSINESS THEREIN)

For the Calendar Year 1921

Do not write in this space
PAYMENT
$
(Collector's Receipt)

CASH CHECK M. O.
Received by

(Name of withholding agent.)

(Address in full.)

INSTRUCTIONS

This return is required to be made by all individuals, corporations, and partnerships, of whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries, employers, and officers and employees of the United States having the control, receipt, custody, disposal, or payment of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income of nonresident alien individuals, foreign partnerships, and foreign corporations, subject to the tax imposed by section 1, title II, of the Revenue Act of 1921, whether or not such individuals, partnerships, and corporations are engaged in trade or business within the United States and whether or not they have any office or place of business within the United States.

This form requires that there shall be deducted and withheld a tax equal to 8 per centum of the amount paid as salaries, wages, rents, etc., to nonresident alien individuals and partnerships having no office or place of business in the United States and 12 per centum of the amount paid to foreign corporations. If any tax required to be deducted and withheld is paid by the recipient of the income, it shall not be withheld from the withholding agent. Income derived from dividends allowed as a credit for normal tax is not subject to withholding.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made during the calendar year 1921 by the above withholding agent and of the tax withheld in payment thereof, to nonresident alien individuals, foreign partnerships, and foreign corporations or their agents, the amount being fixed below and showing the name and address of the recipient of the income, the kind and amount of income paid, and the amount of tax withheld.

DATE	AMOUNT PAID	TAX WITHHELD
25	$	$
25	$	$
Totals	$	$

(Signature)

(Position or title)

Sworn to and subscribed before me this _____ day of _____, 192

(Signature) (Title)

NAME OF RECIPIENT OF INCOME, AND WHETHER INDIVIDUAL, PARTNERSHIP, OR CORPORATION	ADDRESS IN FULL	AMOUNT OF INCOME	AMOUNT OF TAX WITHHELD
		$	$

Totals

Exhibit W 278

EXHIBIT W.

241

DELINQUENT

Form 1042
TREASURY DEPARTMENT
Internal Revenue Service

Collector will stamp here the date of filing if the return is not executed by the taxpayer.

Received

COLLECTOR INT. REV.
OCT 4 1932
PAID or MADE
By

This return must be made to the Collector of Internal Revenue for the district in which the withholding agent is located, on or before March 15, 1922, and the tax must be paid on or before June 15, 1922.

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

For Calendar Year ~~1932~~ 1921

Minnesota and Ontario Power Company
(Name of withholding agent)

1100 Builders Exchange Bldg. Minneapolis, Minnesota
(Address)

Do not write in this space
PAYMENT
$ .....
(Cashier's Stamp)

CASH CHECK M. O.
Received
By .....

INSTRUCTIONS

This return is required to be made by all individuals, corporations, and partnerships, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds), rents, salaries, wages, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 26 (a) of the Revenue Act of 1932) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payers of such income are required to withhold and deduct a tax therefrom at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 15 per cent when paid to foreign corporations.

A nonresident alien individual is entitled to the personal exemption of $1,000, and, in addition, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1115 with his employer not later than February 1 of the succeeding year. By filing Form 1115 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable to compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year ~~1932~~ 1921.

Rate	Amount Paid	Tax Withheld
5%	$	$
8½%		
8%		
10, 15%	164525.98	16452.60
Total	$	$

This return is prepared under Sec.3176 R.S. from the best information available

J. P. Fahnestock
(Signature)
Deputy Collector
(If signed by agent, state relation)

Guy J. Helgeson
Commissioner

Number of Claims for Credit, Form 1115, attached to this return none

Sworn to and subscribed before me this 4th day of Oct, 1932.

A. P. Gardner
(Signature)

Dep. Coll
(Title)

Name of Nonresident Individual or Foreign Payee	Address of Foreign Payee	Amount of Income Paid	Exemptions and Credits (Attach Form 1040)	Amount Taxable	Amount of Tax Withheld
Fort Francis Pulp & Paper Co.	Ltd. Fort Francis Ont.	$ 164525.98		$ 164525.98	$ 16452.60
			AUDIT DIVISION		
			2 89 Bod	ACT 19	
				4525.98	
				4113.26	
				10.556.14	
			Total	31.195.38	
Return Prepared By the					
		164525.98		164525.98	16452.60

EXHIBIT X.
243

281 Mr. Garvey: And the previous statement by the Court, covers the matter of exceptions?

The Court: Yes, an exception is allowed the defendant.

Mr. Hammond: There are one or two cases, your Honor, which hold that the allowance of exceptions generally is not so good, and I wonder if we could have an exception to the rulings as the Court makes them?

The Court: Well, the Court reporter may note an exception after each and every adverse ruling.

Mr. Larson: There are certain objections which the plaintiffs would like to make to certain portions of the stipulated facts. The plaintiffs object to the reception in evidence of Paragraph 3 of Section 5 of the written stipulation, together with Exhibits A and B therein referred to, on the ground that the same is not within the pleadings or issues in this case, and on the further ground that it is irrelevant and immaterial. The same objection is interposed to the reception in evidence of Paragraph C of Section 7. The same objections are interposed also to Paragraph C of Section 8. The plaintiffs object also to the reception in evidence of Paragraph I of Section 9 on the ground that the same is not within the pleadings or issues in the case, and on the further ground that it is irrelevant and immaterial for the particular reason that the years in question in the proceeding, in said paragraph referred to, were not the years involved in the case at bar; that none of the issues in said proceeding or litigated in said proceeding, are presented or at issue in the case at bar, and that the decision in said proceeding was not and is not res adjudicata of any question or issue raised or presented by the pleadings or issues in the case at bar. The plaintiffs object also to the reception in evidence of Paragraphs A and B of Section 14; to the phrase "Pursuant to authorization given in the Court's order aforesaid" in Paragraph C of Section 14, and to Paragraph D of Section 14, together with Exhibits M and N referred to in said
282 Paragraphs A, B, and D, on the ground that the matters referred to are not within the pleadings or issues in this case, and on the further ground that they are irrelevant and immaterial. The plaintiffs object to the reception in evidence of the last sentence of Paragraph A of Section 18, on the ground that said paragraph is not within the pleadings and issues in this case, and on the further ground that it is irrelevant and immaterial. The plaintiffs object to the

reception in evidence of the first two sentences and the last sentence of the first paragraph of Section 18-B together with Exhibit X therein referred to on the ground that they are not within the pleadings or issues in this case, and on the further ground that they are irrelevant and immaterial, and on the further ground that it appears from the stipulated facts that the filing of the return, Exhibit X, by the Deputy Collector as in said paragraph B set out, was and is without authority of law; that it is clear from the admitted facts that the return was prepared and filed after the running of the statute of limitations against the assessment and collection of withholding taxes for the year 1921. May it appear in the record, if your Honor please, that these objections are taken before the reception in evidence of the stipulation?

The Court: Yes, it may so appear.

Mr. Larson: And the Court's ruling in respect to exceptions applies to all rulings on objections made by the plaintiffs or defendant?

The Court: Yes, it is so understood. I do not know just what counsel expect with respect to the ruling on these objections. Of course I am not in a position to intelligently rule at this tme. I assume that you intend to cover the matter in some appropriate brief that will be handed to the Court?

Mr. Larson: That is correct.

283 The Court: Well I will receive the stipulation subject however to such objections as have been noted, or will hereafter be noted, and an exception will be allowed to the plaintiffs.

Mr. Larson: May it please the Court: There are two cases set for trial and hearing this morning, law Number 3391, and the claim of the Collector of Internal Revenue, in Consolidated Proceedings Number 11,640. The Court will recall that the second case was set for trial immediately following Law Number 3391. Certain of the facts which we consider pertinent in Law Number 3391 have been stipulated as facts in Consolidated Proceedings 11,640, and a little later, if it please the Court, I think that counsel for the respective parties will read into the record an agreement covering the reception in evidence in this case of the facts stipulated in the other case.

The Court: Do I understand that there is some additional testimony in the matter of the trustees against the United States?

Mr. Faegre: Yes, and the additional testimony may under the stipulation be applicable in both cases. We are ready to put that in now, if the Court please.

The Court: Well, I understand, however, that the Government is not willing to have any consolidation of these cases—at least that was the understanding that I gathered from you gentlemen.

Mr. Faegre: That is right.

The Court: I am ready now to hear whatever testimony you have to offer in the matter of the trustees against the United States.

Mr. Faegre: Well, we have some testimony there, your Honor.

Thereupon, RALPH D. MAIN was called as a witness on behalf of the trustees, and having been first duly sworn, testified as follows:

Has resided in Minneapolis since 1910, and is employed by the Trustees of the Minnesota & Ontario Paper Company, and by the subsidiaries of the Minnesota & Ontario Paper Company. Prior to February 28th, 1931, the date of receivership of Minnesota & Ontario Paper Co., he was employed by the Fort Frances Pulp & Paper Company, Ltd., a Canadian corporation. He was first employed with
284 that company in 1923. Previous to that employment his business was that of an Accountant on income matters. In 1923 his employment with the Fort Frances Pulp & Paper Company was that of Comptroller, and his duties consisted of supervising all of the accounting, the accounting records and he handled financing matters for his superiors. His employment as Comptroller continued to February 28th, 1931, and from that time to now he has been Treasurer of the Fort Frances Company.

Q. Mr. Main, as comptroller of the Fort Frances Pulp & Paper Company, Ltd., where did you discharge your duties—where did you carry on your work?

Mr. Garvey: Objected to on the ground that it is inadmissible and not within the issues and immaterial under the allegations of the petition as amended; that the statute itself, refers in the same sentence to the maintaining of an office and a business within the United States. The mere allegation of plaintiff that they maintained some sort of an

office in the United States we contend would not be materia that there must be more than that; that the very idea exempting them from withholding tax, where they main tain an office and a business within the United States is b cause in that event an income tax return could be mad and the tax could be collected out of their property interest where they were doing business within the United State and the mere fact that they may have maintained some so of an office is not sufficient to supply a cause of action, or defense, based upon the fact that they were not liable f withholding taxes because they come within that provisi of the statute which exempts those corporations which main tain an office and a business within the United States.

The Court: He may answer.

Mr. Garvey: Exception please.

(Mr. Main continuing.) In the Builders Exchange Build ing in Minneapolis. The general ledger, cash book
285 voucher registers, journals, checks and so on were i Minneapolis, and there would be entered into thos books all sales, all receipts and all disbursements, which in formation would come from International Falls, with respec to the sales, and the information on the disbursements, tha is the invoices for purchases of merchandise and so on, woul come direct to the Minneapolis office from the seller.

He would say about two or three men were engaged s Minneapolis in the normal duties of the Fort Frances Pulp & Paper Company, Ltd., beginning in the year 1923 and extend ing down to the year 1931. The officers that had offices wit the Fort Frances Pulp & Paper Company, Ltd., and dis charged their duties at Minneapolis were Mr. E. W. Backus the President, Seymour W. Backus, the Vice President, an W. F. Brooks, Secretary-Treasurer. Rent was paid by th Fort Frances Pulp & Paper Company, Ltd., for office spac in the Builders Exchange Building, and from about 192 or 1927 the name was put on the door and remained ther continuously, the letters being about four inches deep.

Q. During the years you have mentioned did the For Frances Pulp & Paper Company, Ltd., have printed statio ery and letterheads? A. Yes, sir.

Mr. Garvey: We desire at this time to object to this te timony on the ground that it has to do with the merits o the determination of the Commissioner that resulted in th payment of the withholding tax in 1921 and that there an

no claims for refunds filed with the Commissioner alleged in the pleadings.

The Court: Objection overruled. Exception allowed defendant.

Witness was shown Plaintiff's Exhibits 1, 2, 3, and 4, and testified that that was the style of letterhead that was used by the Fort Frances Pulp & Paper Company, Ltd., on or about the dates the respective exhibits were written, and were used continuously by the Fort Frances Company up to the middle of 1931 when a slight change was made in the letterhead. They were all written from Minneapolis.

286 Plaintiff's Exhibits 1 to 4 inclusive offered in evidence. Said Exhibits 1, 2, 3, and 4 are letters dated October 12, 1923, November 10th 1923, December 3, 1923 and July 17th 1924, respectively; they are typewritten on stationery bearing at the top the following matter in printing:

"Fort Frances Pulp & Paper Co., Ltd.
Manufacturers and Merchants
High Grade News Print Paper
Builders Exchange Building
Minneapolis, Minnesota."

In its upper left hand corner the stationery bears a monogram with the letters "FFP&PCo" intertwined against a dark background.

The addressee on all four exhibits is "A. D. George, Fort Francis, Ont."

Exhibit 1 is signed "E W. Backus"; Exhibit 2 is signed "G. Sherman Collins, Acting Comptroller"; Exhibit 3 is signed the same as Exhibit 2; Exhibit 4 is signed "R. D. Main, Comptroller".

Mr. Garvey: The exhibits are objected to on the ground that it has to do with the correctness of the determination of the Commissioner that resulted in the withholding tax assessment in 1921, and we want the record to show that it is the intention of the Government not to waive the filing of a claim for refund as a prerequisite to the Court inquiring into the legality and the propriety of the assessment of withholding taxes for 1921.

Mr. Carnduff: My name is Carnduff. I wish to note an appearance in this case, for the Government. I am assigned to the trial of Case Number 11,640, in behalf of the United States, and I have just heard that the evidence herein

presented will be considered in the reorganization case 11,640. Am I correct?

The Court: I have not so ruled.

Mr. Carnduff: I simply wished to interpose my appearance, if my case was being considered.

The Court: I understood the Government did not consent to a consolidation, and consequently I am assuming that the testimony that I am now hearing applies only to the case of the trustees vs. the United States. If it is the agreement of counsel that the evidence may be considered in both cases, I have no objection. You gentlemen will have to make yourselves clear to me.

Mr. Faegre: I think the cases are set down to be tried consecutively, but I understand that the Government will agree with us, or are willing to stipulate that the evidence in either case, so far as pertinent, may be treated as received in the other case.

287 Mr. Carnduff: It is my recollection that there was such a stipulation heretofore entered in this case, that the evidence in one case, so far as pertinent, could be considered in the other. I think we can solve this by stating that there will be no objection to this evidence being considered in the other case, to avoid any needless repetition, and save an hour of the Court's time.

The Court: Well, I see that Mr. Larson has called my attention to an order that I apparently overlooked, and apparently there has been an order made that the evidence introduced in this proceeding shall be considered as offered and received upon the claim in the receivership matter, in so far as it may be applicable, or may bear upon the issues therein. I am not sure that I understand your position now with reference to this testimony.

Mr. Carnduff: At this stage of the proceeding, with the consent of the United States Attorney, I wish to enter an appearance in Case Number 3391 Law.

The Court: Very well.

Mr. Carnduff: Is that satisfactory?

Mr. Faegre: Yes.

Mr. Carnduff: And I wish to interpose an objection to this question, which would be, in my opinion, a pertinent objection in my case, although not in the other. I therefore object to the introduction of Plaintiff's Exhibits 1 to 4 inclusive,

in so far as Case Number 11,640 is concerned, for the reason that these exhibits are immaterial, incompetent, and do not tend to prove or disprove any of the issues in cause Number 11,640 and are not properly circumscribed by the issues therein, in that these exhibits tend to show an office of the Fort Frances Pulp & Paper Company, Ltd. in the United States during the year 1923, and the year 1924, and whether they had an office in the United States in those years or not is entirely incompetent and irrelevant in cause Number
288 11,640, because cause Number 11,640 is a claim in respect of withholding taxes due because of a payment in the year 1927 and 1927 alone.

The Court: Well, I understood the witness to testify that the letterhead as indicated by these exhibits are samples of the style of letterhead used during the years that the Fort Frances Pulp & Paper Company, Ltd., maintained its office in Minneapolis—is that right?

The Witness: Yes, including part of 1931.

The Court: I will receive them in evidence. Exception allowed.

The Witness: (Continuing.) Since 1931 substantially the same letterhead has been used but the trade-mark in the left hand corner of Exhibit 1 has been eliminated. There was an annual audit made by public accountants of the affairs of the Fort Frances Pulp & Paper Company, Ltd., during the years 1923 to 1933, inclusive, the major portion of the work of the auditors was carried on in Minneapolis, and some of it at International Falls. The general ledger, journals and cash books kept in Minneapolis were the only books of that nature kept by the company, no duplicate being kept elsewhere. The Fort Frances Pulp & Paper Company, Ltd., did not have an office in International Falls during those years; its office being in Minneapolis.

Witness stated that Plaintiff's Exhibits 5, 6, and 7, were received at the office of the Fort Frances Pulp & Paper Company, Ltd., in Minneapolis on or about their respective dates.

Exhibit 5 is a letter written on unprinted letter paper. It is dated as follows "International Falls, Office Of The Vice President, May 12, 1926". It is addressed as follows: Fort Frances Pulp & Paper Co. Minneapolis, Attention of R. D. Main". It is signed as follows: "Fort Frances Pulp & Paper Company George McLean".

On its upper right hand side bears an impression stamped in blue stating "Received May 13, 1926 at 9.15".

Exhibit 6 is a letter on the stationery of H. A. Tibbetts, Barrister And Solicitor, Fort Frances, Ontario"., signed by H. A. Tibbetts as Town Solicitor of the town of Fort Frances, Ont., It is dated May 11th 1926 and is addressed to George McLean, Esq., Vice President The Ontario & Minn Power Co., International Falls, Minn".

Exhibit 7 is a letter on the stationery of C. R. Fitch Barrister And Solicitor of Fort Frances, Ont., it is signed by Mr. Fitch; bears date May 15th 1926 and is addressed to Fort Frances Pulp & Paper Co., Ltd. 1100 Builders Exchange Minneapolis, Minn". In its upper right hand corner Exhibit 7 bears a stamped imprint in blue showing received on May 17th 1926 at 10:15.

Mr. Faegre: Exhibits 5, 6, and 7 are offered, not as evidence of their contents, but as letters which were addressed to the Fort Frances Pulp & Paper Company, Ltd., at Minneapolis during the year 1926 to show that it was customarily receiving mail there.

Mr. Garvey: The exhibits are objected to as not within the issues, and irrelevant to any issue properly before the Court.

289 The Court: They may be received in evidence. Exception allowed.

Witness shown Plaintiffs' Exhibits 8, 8-A, and 8-B, and testified he first saw those exhibits on or about July 7, 1926, the date they bear, at the Minneapolis office, same being a communication addressed to the Fort Frances Pulp & Paper Company, Ltd., at Minneapolis.

Mr. Faegre: We offer in evidence Plaintiffs' Exhibits 8, 8-A, and 8-B, as well as the contents of these letters, since they show that the taxing officials of the town of Fort Frances were addressing notices of local taxes to Fort Frances Pulp & Paper Company Ltd. at 1100 Builders Exchange, Minneapolis, Minnesota, in the year 1926.

Exhibit 8 is a letter on printed stationery of the Town of Fort Frances, Ont., dated July 7th 1926, signed J. W. Walker, Clerk, and addressed to The Ontario & Minnesota Power Company, Ltd., The Fort Frances Pulp & Paper Co., Ltd., The International Bridge & Terminal Co. Ltd., 1100 Builders' Exchange, Minneapolis Minn., Exhibit 8 refers to a tax notice therewith enclosed and served upon the addressees. Exhibit 8 bears a blue stamped imprint at its upper right hand corner showing received on July 9th 1926 at 10:15.

Exhibits 8-A is a printed form entitled "Tax Notice—Town of Fort Frances 1926". It notifies the addressees in Exhibit 8 of the assessment of taxes against them and the demand for payment thereof in the total amount of $53,284.-31.

Exhibit 8-B is a Tax Notice form similar to Exhibit 8-A and is a notification to the three addressees in Exhibit 8. It is designated in typewriting "Alternative statement" and demands a payment of $36,087.76.

Mr. Garvey: Objected to on the ground that the exhibits are not relevant to any issue properly before this Court.

The Court: I do not assume that either counsel in these two cases object to the foundation that may have been laid for the exhibits?

Mr. Carnduff: No.

The Court: The exhibits will be received. Exception allowed.

The Witness: (Continuing.) Witness is shown Plaintiffs Exhibit 9 and testified that it is a letter that was received from the town of Fort Frances on or about August 2, 1926, relating to the taxes that were referred to in Plaintiffs' Exhibits 8, 8-A, and 8-B; which letter was received at the Minneapolis office of the Fort Frances Pulp & Paper Company, Ltd. There is a circular blue stamp in the upper right hand portion indicating the receipt of it by the company. The exhibit is addressed to the Fort Frances Pulp & Paper Company, Ltd. and refers to a check for $36,959.23 and he would say that a check was drawn at or about that time for payment of taxes to the town or Fort Frances; check being drawn at Minneapolis.

Exhibit 9 is a letter on printed stationery of the Town of Fort Frances, Ont., dated August 2, 1926, signed H. E. Marr, Treasurer, and addressed to Fort Frances Pulp & Paper Co., 1100 Builders' Exchange, Minneapolis, Minn. The stamp indicates the time of receipt as August 4, 1926 at 8:45.

Witness is shown Plaintiffs' Exhibit 10, and states it is a pencilled memorandum in his handwriting of the com-
290 putation of this tax referred to in Plaintiffs' Exhibit 9 for which the check was issued, and also relates to the same subject matter described in Plaintiffs' Exhibits 8, 8-A, and 8-B. It was the practice of the Fort Frances Pulp & Paper Company Ltd. during 1923 to 1933 to draw its checks at Minneapolis.

Exhibit 10 is on a printed form entitled "Office of Comptroller, Special Memo". It bears pencil notations and figures and a stamped imprint stating "Paid July 29, 1926".

Up to 1933 the company maintained a bank account in the Dominion Bank at Fort Frances, and they also had a bank account with the Continental Illinois Bank & Trust Company at Chicago up to 1931.

Plaintiffs' Exhibits 8, 8-A, 8-B, and 9 and 10 offered in evidence.

Mr. Garvey: The defendant objects to the reception in evidence of these exhibits on the ground that they are not relevant to any issue properly before this Court.

The Court: Exhibits received. Exception allowed.

The Witness: (Continuing.) Witness is shown Plaintiffs' Exhibits 11, 11-A, and 11-B and stated that Exhibit 11 was a letter received at Minneapolis by the Fort Frances Pulp & Paper Company, Ltd., on or about the date it bears, and in the top right hand corner is the receiving stamp of the Minneapolis office, dated August 23, 1926.

Exhibit 11 is a letter bearing the printed heading "Province of Ontario, Office of Crown Timber Agency". It is dated at Fort Frances, Ont, August 20th 1926 is signed J. A. Alexander, Crown Timber Agent, and is addressed to "The Fort Frances Pulp & Paper Co., International Falls, Minn." At its upper right hand corner it bears a blue stamped imprint showing receipt August 23, 1926 at 8:45.

Exhibit 11-A was enclosed with Exhibit 11, and is a notice of sale of timber bearing imprint the headnote "Ontario, Department of Lands and Forests, Forestry Branch".

Exhibit 11-B is the second and concluding page of the notice beginning on Exhibit 11-A.

Mr. Faegre: Plaintiffs' Exhibit 11 we offer in evidence as showing that the Crown Timber Agency of the Province of Ontario was in 1926 conducting business with the Fort Frances Pulp & Paper Company, Ltd., by addressing letters to the latter at Minneapolis.

Mr. Garvey: Objected to as irrelevant to any issue properly before this Court.

The Court: It may be received. Exception allowed.

The Witness: (Continuing.) Plaintiffs' Exhibit 12 is a copy of the annual tax return of the Fort Frances Pulp &

Paper Company, Ltd., filed with the Dominion of Canada for the year 1926. It was prepared under his direc-
291 tion on April 15, 1927. In the preparation of Plaintiffs' Exhibit 12 he had at the Minneapolis office of the Fort Frances Pulp & Paper Company, Ltd. all the data required for its preparation, and all the general records the general ledger and journals and the supporting vouchers. None of these records were at any other point other than its Minneapolis office.

Exhibit 12 is on a printed form entitled "Dominion of Canada, Income Tax, 1926". and the "Head Office Address" of the Fort Frances Pulp & Paper Company Limited is thereon given as "1100 Builders Exchange Building, Minneapolis, Minnesota" and the "Address of Chief Office in Canada" as "Fort Frances, Ontario".

Mr. Faegre: We offer Plaintiff's Exhibit 12 in evidence.

Mr. Garvey: Objected to as not relevant to any issue properly before this Court.

The Court: It may be received. Exception allowed.

The Witness: (Continuing.) Plaintiff's Exhibit 12 shows the return of interest paid or accrued; interest received or accrued from the Minnesota & Ontario Paper Company during the year 1926 by the Fort Frances Pulp & Paper Company, Ltd., which you will find on Schedule 2-E thereof under the heading "Other interest". The entry is "Other interest; Minnesota & Ontario Paper Company $310,593.23".

From year to year the Canadian or the Ontario Provincial Income Tax Officers checked the income tax return of the Fort Frances Pulp & Paper Company, Ltd. which was done at Minneapolis. They could not have found any records of the Fort Frances Pulp & Paper Company, Ltd. located elsewhere. He would say that the audit or checking by the Canadian tax officials occurred in Minneapolis during all the years 1923 to 1933 inclusive.

Witness identifies Plaintiffs' Exhibit 13 as a letter from the town of Fort Frances, signed by H. E. Marr, Treasurer, to Fort Frances Pulp & Paper Company, Ltd., 1100 Builders Exchange Building, Minneapolis, Minnesota, and relates to taxes due to the town of Fort Frances, received on or about July 8, 1927, at Minneapolis. Witness explains Plain-
292 tiffs' Exhibit 13-A as a copy of a letter dated July 19, 1927, written by himself and addressed to A. D. George, Fort Frances, Ontario, written at Minneapolis, to which was attached a copy of Plaintiffs' Exhibit 13.

Mr. Faegre: I offer in evidence Plaintiffs' Exhibits 13 and 13-A.

Mr. Garvey: Objected to on the same ground as stated to the previous exhibits.

The Court: The exhibits may be received. Exception allowed.

The Witness: (Continuing.) The witness identified plaintiffs' Exhibit 14 as a letter from the Inspector of Income Tax for the Dominion of Canada, dated April 16, 1927, from Fort William, addressed to the Fort Frances Pulp & Paper Company, Ltd., at Minneapolis, U. S. A., for his attention, received at Minneapolis, and bearing a receiving stamp. It shows an indebtedness in income taxes of $17,840.55.

Mr. Faegre: Plaintiffs' Exhibit 14 offered in evidence.

Mr. Garvey: Objected to on the same ground as stated to the previous exhibits.

The Court: It may be received. Exception allowed.

The Witness: (Continuing). The witness stated that during the year 1927 he had discussions with representatives of the Revenue Department of the United States Government regarding an examination of the books and records of the Fort Frances Pulp & Paper Company, Ltd. at its office 1100 Builders Exchange in Minneapolis. He thought the man's name was A. W. Hayes, and he was a representative of the Internal Revenue Department of the United States. The records of the Fort Frances Pulp & Paper Company, Ltd. were made available to the representatives of the Revenue Department in the year 1927 for examination at 1100 Builders Exchange Building. Witness identifies Plaintiffs' Exhibit 15 as a copy of a letter dated August 23, 1927, written by himself, as Comptroller of Fort Frances Pulp & Paper Company, Ltd.,
293 to Mr. G. W. Kurtz, Internal Revenue Agent in Charge at St. Paul Minnesota. It states in response to request by the addressee that Fort Frances Pulp & Paper Company would be pleased to have a representative of the addressee's office, call at any time for inspection of its books of Fort Frances Pulp & Paper Co.

Mr. Faegre: Plaintiffs' Exhibit 15 offered in evidence.

Mr. Garvey: The same objection as made to the previous exhibits.

The Court: The exhibit may be received. Exception.

The Witness: (Continuing.) The witness' attention was called to the language in Plaintiffs' Exhibit 15 relating to making available the books of the Fort Frances Pulp & Paper Company, Ltd., to representatives of the Revenue Agent's office, and then the witness stated that representatives of the Internal Revenue Department called at 1100 Builders Exchange at the office of the Fort Frances Pulp & Paper Company, Ltd. and inspected the records and books of that company; all the books and records were made available to them for the examination, which took about two or three days.

The witness identifies Plaintiffs' Exhibits 12-A, 12-B, 12-C, and 12-D as original receipts received from the Dominion of Canada for the payment by Fort Frances Pulp & Paper Company, Ltd. of 1926 income tax. Exhibit 12-A received at Minneapolis May 9, 1927; 12-B, on July 9, 1927; and 12-C, about September 2nd, or 3rd, 1927, and 12-D, about November 3rd or 4th. All four exhibits are addressed to Fort Francis Pulp & Paper Company at 1100 Builders Exchange, Minneapolis, Minn.

Plaintiffs offer in evidence Exhibits 12-A, 12-B, 12-C, and 12-D, which are objected to by defendant on the same grounds as previously stated, received in evidence, and exception allowed.

Witness is shown Plaintiffs' Exhibit 16 consisting of nine pages and identifies the exhibit as a file of letters between Fort Frances Pulp & Paper Company, Ltd. and Dominion Tax Officials relating to the 1923 assessment against the Fort Frances Pulp & Paper Company, Ltd. by the Dominion of Canada.

Five of the nine sheets are copies of letters to Tax Officials of the Dominion of Canada and are signed by Fort Frances Pulp & Paper Company by various of its officers; three of the nine sheets are communications from Canadian Income Tax officials addressed to Fort Frances Pulp & Paper Company at Builders Exchange Building, Minneapolis, Minnesota; one of the nine sheets is a receipt signed by the Inspector of the Income Tax of the Dominion of Canada acknowledging receipt of $13,450.44 from Fort Frances Pulp & Paper Company, addressed to the Builders Exchange Building, Minneapolis, Minn.

294 Plaintiffs offer in evidence Plaintiffs' Exhibit 16, which is objected to on the same grounds stated to the other exhibits. Exhibit received and exception allowed.

From six to eight people were employed for whole or part time during 1923 to 1933 in the business of the Fort Frances Pulp & Paper Company, Ltd. at its office in Minneapolis, and the character of the business was substantially the same during those years; that is, the keeping of accounting records, drawing of checks, receipt of mail and the examination and audit of records here by the Canadian authorities has been substantially the same during all those years.

The Minneapolis City Directories for the years 1926, 1927, and 1928 list the Fort Frances Pulp & Paper Company Ltd., as having an office at 1100 Builders Exchange in Minneapolis, and for 1927 lists the officers as E. W. Backus, President, and W. F. Brooks, Secretary-Treasurer. Mr. Brooks and Mr. Backus were residents of Minneapolis during those years and continuously from 1923 to their deaths in 1928 and 1934 respectively.

Cross-Examination.

Witness testified he was Comptroller for the Fort Frances Pulp & Paper Company, Ltd. in 1927, and his attention was called to his identification of an exhibit wherein he wrote to the Revenue Officers of the United States and that a few days thereafter they came to his office in Minneapolis. At that time he was thoroughly familiar with the affairs of the Fort Frances Pulp & Paper Company, Ltd. and was the responsible officer with reference to its accounting and financing. He remembers that during the year 1927 an adjustment of credits was made between the Minnesota & Ontario Paper Company and the Fort Frances Pulp & Paper Company, Ltd., and a large sum of interest was paid by the American company to the Canadian company. He cannot remember whether that payment was made before or after the revenue officers of the United States came to his office in 1927. When asked as to his best recollection, he stated that he could not answer the
295 question. He was present, but not all the time, when the revenue officers of the United States came to his office in 1927 and he discussed the affairs of the Fort Frances Pulp & Paper Company, Ltd. with them, but does not remember whether or not he called their attention to the $1,498,000 odd interest paid at that time. He stated he was not the tax counsel for the company during all those years, and although he partially advised the Fort Frances Pulp & Paper Company, Ltd. with reference to their taxes in the year 1927, they had a tax counsel. He had the Canadian Income Tax return under his direction. During the years 1921 to 1927 inclusive, the Fort Frances Pulp & Paper Company, Ltd. filed no tax

returns of any nature whatsoever to the United States, and it is so stipulated to that effect. He considered the filing of such returns at various times. He had nothing to do with the tax returns for the Minnesota & Ontario Paper Company. He had something to do with returns made to the United States on behalf of the other companies affiliated or associated with it, and when he believed such returns should be made, he caused them to be prepared. During the course of that work it became necessary to consult the statutes and regulations concerning United States tax returns and he was more or less reasonably familiar with them in the year 1927. His attention was called to Regulation 69 of the Commissioner pertaining to the regulatory act of 1926 and with special reference to Article 601, that if you claim exemption as a foreign corporation because you have an office in the United States you should file Form Number 1086 advising the Government of that fact, and witness stated he probably read it, but is not familiar with Form 1086. As to why the Fort Frances Pulp & Paper Company, Ltd. did not file Form 1086, the witness stated that he does not know what form 1086 is and he could not answer that question. Argument between counsel as to whether Form 1086 should be filed with the debtor or the United States, and the witness was then asked whether he filed Form 1086 with the Minnesota & Ontario Paper Company in behalf of the Fort Frances Pulp & Paper Company, Ltd. and he stated he had no recollection of it. When asked why he did not prepare and file said form claiming that the Fort Frances Pulp & Paper Company Ltd. had an office in the United
226 States, he stated, he can only answer that by saying that he had to leave the details of the returns to those who came under his supervision, and that he personally had no time to do it himself.

Mr. Backus and Mr. Brooks in 1927 were officers of all the affiliated companies of the Minnesota & Ontario Paper Company. As to whether they received a separate salary from all the companies, the witness stated that they did not receive a separate check. The office at 1100 Builders Exchange in the City of Minneapolis covered the entire 11th floor and part of the 12th floor of that building. It was the main and central office of the Minnesota & Ontraio Paper Company and the name on the door of the Fort Frances Pulp & Paper Company, Ltd., was among the names of a large number of corporations, he thought about eight. There was no separate room in that suite devoted solely to the office of the Fort Frances Pulp & Paper Company and the records were kept in the main accounting office. The books and papers of the Fort Frances Company were not kept indiscriminately

with the books & records of the various companies. The books of the subsidiaries were kept in a certain definite location in the vault; each one was alloted a certain place in the vault. The Fort Frances Pulp & Paper Company, Ltd. was alloted two desks in a large room, with other desks. He would say there were about 25 desks in that room. He sat in what was known as the front office and not at one of the two desks. He had a private office. He devoted his time not only to the Fort Frances Pulp & Paper Company, Ltd., but to the other subsidiary companies of the Minnesota & Ontario Paper Company. The six or eight people referred to did not work full time for the Fort Frances Co. The two or three persons he testified to as working for the Fort Frances Pulp & Paper Company, Ltd. occupied the two desks in the large office, and he would say, devoted their time solely to the Fort Frances Pulp & Paper Company, Ltd. Their salaries were paid by the parent corporation, the Minnesota & Ontario Paper Company, and charged 100% to the Fort Frances Pulp & Paper Company, Ltd. His salary was paid the same way and he was not paid a separate compensation every month solely and exclusively from the Fort Frances Pulp & Paper Company, Ltd.

297 The Fort Frances Pulp & Paper Company, Ltd., had no bank account in Minneapolis from 1923 to 1934. In 1921 and 1922 he did not know as he was not Comptroller then, as he was working on income tax matters with Peet, Marwick and Mitchell, and anything he testified to concerning 1921 and 1922 to a very great extent he knows by hearsay, by looking at the books, and by somebody telling him. With respect to the bank account kept by the Fort Frances Pulp and Paper Company, Ltd. kept in the Dominion of Canada, and in the Continental and Commercial Bank in Chicago, he would state that the average account between 1923 and 1927 at Chicago would be $5,000 to $10,000. The purpose of the Chicago account was to pay for any purchases which might be due in United States funds. The main bank account was kept in Canada in the Dominion bank. He did not think that any tax returns during the years 1923 to 1927 inclusive were ever made to the State of Minnesota or to the County of Hennepin or the City of Minneapolis by the Fort Frances Pulp & Paper Company, Ltd. He did not know of any property of the Fort Frances Pulp & Paper Company, Ltd. in Minneapolis outside of its ledgers and desks. Whether the two desks were owned by the Minnesota & Ontario Paper Company, he couldn't say. Outside of the books and records, he could not remember of any other property owned by the Fort Frances Pulp & Paper Company, Ltd. in the State of Minne-

sota. Their plant was in Canada, and their products were made in Canada, and outside of himself, Mr. Backus, Mr. Brooks and the two employees at the desks, everybody else employed by the Fort Frances Pulp & Paper Company, Ltd. was employed in Canada. It had no salesmen in the United States, and they did not sell any goods in the United States. All the paper they sold was made in Canada. The two or three employees employed at the two desks referred to in Minneapolis, were men bookkeepers. The check paid to the Canadian Government for income taxes due to Canada in the year 1926, as he testified to, could only have been drawn on the Dominion Bank, as there would not have been enough money anywhere else to pay it. Witness testified he now resides in Minneapolis and is an American citizen and was in 1927.

296 Redirect Examination.

The Fort Frances Pulp & Paper Company, Ltd., sold its manufactured products at Fort Frances in Canada, and its products were purchased by the Minnesota & Ontario Paper Company, with the exception of a few tons that might have been sold in Canada. In operating a factory of this character the operator of the mill usually planned his machine operations for a period of four weeks ahead, and this planning or determination was made in Minneapolis. Nearly always Mr. E. W. Backus or Mr. S. W. Backus gave the final instructions for the operations of the machines, that is, as to how many days they were to run and the tonnage to be produced. Corporate meetings of the Fort Frances Pulp & Paper Company, Ltd. were held in Minneapolis, and during the years 1926, 1927, and 1928, the Board of Directors on an average met about twice a year. He was not sure whether he was made a director, in 1927 or 1928. He would say that the adjustment entries of accounts between the Minnesota & Ontario Paper Company and the Fort Frances Pulp & Paper Company, Ltd. made during the year 1927 was reflected upon the books of the Fort Frances Pulp & Paper Company, Ltd. at the time the representatives of the Bureau of Internal Revenue were in the office of this company examining its records, he having refreshed his recollection from examination of the journal entry which is dated May 30, 1931.

Recross Examination.

With respect to the common room in the Builders Exchange Building, the Fort Frances Pulp & Paper Company, Ltd. paid to the Minnesota & Ontario Paper Company rent for

that space between $80.00 and $90.00 a month. It paid no rent direct to the owner or landlord of the building. An entry was made on its books to the parent company.

To his knowledge the Fort Frances Pulp & Paper Company, Ltd. never secured permission to do business in
299 the State of Minnesota, and never filed a petition seeking a license to do business in Minnesota with the Secretary of State of the State of Minnesota during the years 1923 to 1927.

Mr. Garvey: At this time, having just completed the cross-examination of the witness, R. D. Main, the defendant, in the present refund tax case, moves to strike out all of the testimony of that witness on the ground, first, that it is not pertinent to any issue properly before this Court, and second, because the statement of the witness himself shows that his testimony all relates to matters after the year 1922 and that anything in his testimony with reference to the year 1921, which is the only withholding tax involved in this law suit, would be hearsay.

The Court: I will deny the motion. Exception allowed.

Mr. Larson: The record may show that the parties in both Law Number 3391, and in the claim of the United States Collector of Internal Revenue in Consolidated Proceedings Number 11,640, agree that all testimony or evidence offered in either case, whether or not stipulated, may be considered as in the other case, subject, however, to the reserved rights of the parties as respects stipulated facts, to interpose objections on the grounds specified in the written stipulation as filed, and subject also to the reserved rights of the parties as respects other testimony or evidence, to interpose objections on any grounds whatever, and that all objections interposed to the receipt of evidence in either case may and shall be understood and considered as interposed to the receipt of the same evidence in the other case.

The Court: I understand that stipulation is acquiesced in by counsel?

Mr. Carnduff: In so far as the reorganization case 11,640, the United States agrees to this stipulation, and so stipulates.

300 Mr. Garvey: In so far as the refund tax case is concerned, any evidence or testimony in the withholding tax case will be objected to in the other case, not because they are not facts, but because of the jurisdictional questions

and as to the cause of action, and the other objections offered to the evidence offered in the refunding tax case.

The Court: Well, I have no objection to your putting in a stipulation to the effect that, subject to the objections that you have made in the main case, that the Court may consider testimony offered in either case, as offered in both cases.

Mr. Garvey: Subject to the objections stated, your Honor.

Mr. Larson: In case Number 11,640, the agreement which I will now read into the record, upon one point, may seem a little premature. However, it is necessary to read it into the case at this time as well as in the other case. The Court will observe that paragraph B of Section 15 of the written stipulation of facts in case Law Number 3391, the parties have agreed in sub-paragraphs 1, 2, 3, and 4, that the following amounts of interest allowed by the Commissioner on overpayments for the years 1922 to 1925 inclusive were applied by the Commissioner against withholding taxes, penalties and interest assessed by the Commissioner against the Paper Company for the year 1921; $24,034.73 of interest on the overpayment for 1922; $1,235.69 of interest on the overpayment for 1923; $3,038.92 of interest on the overpayment for 1924, and $2,501.09 of interest on the overpayment for 1925; a total of the four amounts of $30,810.46. The record may show that the parties do now stipulate and agree further that the four items of interest referred to are the same items of interest as those set out in corresponding amounts in paragraph O of Section 4 of the written stipulation of facts that will be filed with respect to the claim of the United States Collector of Internal Revenue in Consolidated Proceedings Number 11,640 and that the withholding tax assessment of $31,121.89 re-
ferred to in said paragraph O of that stipulation con-
301 stitutes the withholding taxes against which said four items of interest on the overpayments for 1922 to 1925, inclusive, were applied as credits. Is that all right, Mr. Garvey?

Mr. Garvey: That is all right.

The Court: Will you furnish me with a memorandum of that, so I will be able to get it fully before me?

Mr. Larson: Yes.

Mr. Carrduff: I believe it is fully covered in the stipulation in my case. It is written out, and the only thing is that he wants to incorporate it in this case.

The Court: I see.

Mr. Larson: The plaintiffs have no further evidence at this time to submit in this Case Number 3391, the case now being heard, except as the testimony that is stipulated and will be represented by written filed stipulation in Consolidated Proceeding Number 11,640 applies to the evidence in the present case. Under the circumstances, it appears to us that we should not formally rest in case Number 3391 until the stipulation has been filed in the other proceeding. If that is agreeable to the Court and counsel, we are prepared to proceed with Case Number 11,640.

Mr. Garvey: It would seem to us, your Honor, that if the plaintiffs, when they have completed their case, do not rest, it may lead to confusion, in that there was no intention to consolidate these cases. It would seem to us that if the plaintiffs desire to offer, as evidence in this case now, the stipulation taken in the other case, that that would be the proper way to do it, rather than to attempt to hold this case in abeyance while they are doing something in the other case.

The Court: Well, I don't know that we need to be overly technical about it. The plaintiffs, as I understand it, in so far as Law Case Number 3391 is concerned, have concluded their testimony.

Mr. Larson: That is correct, your Honor.

302 The Court: And rest, in so far as that particular case is concerned, subject to the right to proceed with further evidence, as it may be necessary, in the action brought by the United States against the trustees.

Mr. Larson: That is correct.

Mr. Garvey: Well, regarding the matter of making a formal application for judgment in this case, this would necessitate postponing the doing of that until after they determine whether they intended to offer further evidence.

The Court: Well, your rights, in so far as may be necessary to protect them, will be preserved I presume with the same effect if you postponed the motion until the testimony is closed in both cases.

Mr. Garvey: The plaintiffs having rested in this case, the defendant now renews its motion to dismiss, the motion for dismissal heretofore having been filed.

The Court: The motion will be denied.

Mr. Garvey: We request that the record grant us an exception to the ruling of the Court.

The Court: Very well.

Mr. Garvey: The defendant, now resting, makes a motion for judgment and requests that the Court permit it to file its formal written motion for judgment.

The Court: The motion may be filed, and the Court will reserve its ruling, and it may be understood that in the event the motion is not granted, the defendant is reserved an exception.

The motion for judgment so filed, omitting caption, was in words and figures as follows:

303 Defendant's Motion For Judgment.

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of the Minnesota & Ontario Paper Company, a Corporation, Plaintiffs,
No. 3,391. vs. At Law.
United States of America, Defendant.

Now comes the United States of America, defendant in the above entitled action, by George F. Sullivan, United States Attorney for the District of Minnesota, and John E. Garvey, Special Assistant to the Attorney General, and moves the Court for judgment in its favor on the ground and for the reason that there is no evidence and certainly no substantial evidence upon which the Court can come to any other conclusion, and moves the Court further for judgment in favor of the plaintiff and against the defendant on each of the following grounds:

(1) That at the time of the commencement of this action, suit for the recovery of claimed overpayments of the Minnesota & Ontario Paper Company's consolidated income taxes for the years 1922 to 1925, both inclusive, was barred by the statute of limitations properly applicable thereto.

(2) That at the time of the commencement of this action, suit for the recovery of claimed overpayments of Minnesota & Ontario Paper Company's consolidated income taxes for the years 1922 to 1925, both inclusive, could not have been maintained against the Collector if he were in office, and accordingly this court does not have jurisdicton of this suit against the United States as defendant, in that the amount claimed for each of said years is in excess of $10,000.

304 (3) That at the time of the commencement of this action, the Collector, if he were in office, would not have

been liable to suit for interest on claimed overpayments of income taxes. Accordingly, to the extent recovery is sought in this action for interest on claimed overpayment of taxes for the years 1922 to 1925, both inclusive, (being the interest credited by the Commissioner of Internal Revenue on withholding tax assessment for the year 1921) this court is without jurisdiction of such purported cause of action against the United States in that the amount sought to be recovered as interest is in excess of $10,000.

(4) That this court does not have jurisdiction of the purported cause of action to recover claimed interest on claimed overpayments of income taxes for the years 1922 to 1925, both inclusive, for the reason that such interest was allowed by the Commissioner of Internal Revenue as a credit on and payment of a withholding tax assessment made against the Minnesota & Ontario Paper Company for the year 1921; that claim for refund of the amount so collected by credit on and under the said withholding tax assessment for the year 1921 has never been filed with the Commissioner of Internal Revenue.

(5) That the withholding tax assessment made by the Commissioner of Internal Revenue against the Minnesota & Ontario Paper Company on account of interest owing and paid by it on open account, for the year 1921, to the Fort Francis Pulp and Paper Company, a Canadian corporation, was made within the statutory period of limitations properly applicable thereto; that the correctness of the Commissioner's determination of tax liability that resulted in said assessment cannot be inquired into by this court, under the allegations of the pleadings in the case and the proofs presented.

(6) That this court does not have jurisdiction of the purported cause of action against the United States to recover claimed overpayments of income taxes for the year 1922 for the reason that, prior to the commencement of this action, an action by the Minnesota & Ontario Paper Company, against the Collector who collected the said tax, was commenced in this court to recover the same claimed overpayments as those alleged in this action, and such suit was based on the same claims for refund, and such former action was, by the plaintiff, dismissed with prejudice, and the present purported cause of action against the United States is to recover a sum in excess of $10,000.

305

(7) That this court does not have jurisdiction of the purported causes of action to recover claimed overpayments of income taxes for the years 1924 and 1925 for the reason that,

prior to the commencement of this action, on appeal thereto by the Minnesota & Ontario Paper Company, the United States Board of Tax Appeals regularly and by and through its orders which have become final, did on the 22 day of June, 1933, determine the tax liability of the said taxpayer for the said years 1924 and 1925, and did determine overpayments for each of said years, and the overpayments as so determined were credited by the Commissioner of Internal Revenue to tax assessments for other years against the same taxpayer, the said credits being made in accordance with the statutes in such cases made and provided; that, accordingly, the matters on which adjudication is sought in this action for the years in question have, before the commencement of this action, been finally adjudicated by the said Board of Tax Appeals.

(8) That prior to the commencement of this action, the claimed overpayments of income taxes for the years 1922 to 1925, both inclusive, were, by the Commissioner of Internal Revenue, pursuant to the mandatory provisions of applicable statutes, credited on deficiency tax assessments outstanding against the same taxpayer for other years, and, accordingly, the said claimed overpayment of income taxes for the said years 1922 to 1925, both inclusive, have been fully paid and satisfied by the application of the amount thereof as payments on said outstanding tax assessments for other years.

306 (9) That this Court does not have jurisdiction of purported causes of action for the recovery of claimed overpayments by credit of the income tax assessments for the years 1926, 1927, and 1928 for the following reasons: (1) that such collections by credit were made by the Commissioner and not by a collector; (2) that claims for refund of the amounts so collected by credit are not alleged or proven to have been filed with the Commissioner.

(10) That plaintiffs have wholly failed to prove that the Minnesota & Ontario Paper Company sustained a consolidated net loss in the year 1928; that the plaintiffs have failed to prove that the 1928 deficiency assessment for the sum of $7,758.58 tax, and $518.34 interest collected from the Minnesota & Ontario Paper Company on the 23rd day of April, 1930 was in excess of the income tax then and there owing by the said taxpayer for the said year; and plaintiffs have further wholly failed to prove that the income tax liability of the Minnesota & Ontario Paper Company for the year 1928 was overpaid at any time, in any amount or in any manner.

(11) That the plaintiffs have wholly failed to prove that the paper company sustained a consolidated net loss for the year 1926; that the plaintiffs have wholly failed to prove that the item of $788,879.21 and the item of $1,475.99 are allowable as deductions from the consolidated income of the paper company and its affiliates for the year 1926; that the plaintiffs have wholly failed to prove that the income tax liability of the paper company and its affiliates for the year 1926, as finally determined by the Commissioner was erroneous or illegal; that the plaintiffs have wholly failed to prove that the income tax assessed and collected by credit for the said year 1926 was illegally or erroneously assessed or collected; that the plaintiffs have failed to prove that the paper company overpaid its income tax liability for the year 1926 in any amount.

(12) That the plaintiffs have wholly failed to prove that the paper company sustained a consolidated net loss
307 for the year 1927; that the plaintiffs have further failed to prove that the income tax liability of the paper company and its affiliates for the year 1927, as finally determined by the Commissioner was erroneous or illegal; that the plaintiffs have further failed to prove that the income tax assessed and collected by credit for the said year 1927 was illegally or erroneously assessed or collected; that the plaintiffs have further failed to prove that the paper company overpaid its income tax liability for the year 1927 in any amount.

(13) That the plaintiffs have wholly failed to prove that the income tax liability of the paper company and its affiliates for the year 1928, as finally determined by the Commissioner, was erroneous or illegal; that the plaintiffs have failed to prove that the income tax assessed and collected by credit for the year 1928 was illegally or erroneously assessed or collected.

(14) That the plaintiffs have wholly failed to allege or prove any cause of action against the defendant that entitles them to a judgment in this court.

(15) That this action should be dismissed as against the plaintiffs and defendant should have judgment for its costs and disbursements herein.

(16) That judgment in this case should be entered in favor of the defendant.

Respectfully submitted,

GEORGE F. SULLIVAN,
United States Attorney.

JOHN E. GARVEY,
Special Assistant to the Attorney General.

308 Mr. Larson: The plaintiffs at this time also make a motion for judgment, and will file a formal motion later.

The plaintiffs' motion for judgment later filed was, omitting caption, in words and figures as follows:

309 Motion By Plaintiffs For Judgment.

In the District Court of the United States In and For the District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. At Law.
United States of America, Defendant.

Come now the plaintiffs and move the Court for judgment in favor of the plaintiffs as prayed in the petition herein, together with interest thereon until payment or refund thereof, as provided by law, and for the plaintiffs' costs of suit herein, and that the Court adjudge and decree that the claim of the plaintiffs against the defendant is a valid claim, that the whole thereof is justly due from the defendant, and that the defendant's answer and objections thereto are without merit and are overruled.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiffs,
1260 Northwestern Bank Building,
Minneapolis, Minnesota.

Cobb, Hoke, Benson, Krause & Faegre,
Of Counsel.

---

310 The Court: The record may show that permission is given to the plaintiffs to file their written motion for judgment later, and the record may also indicate that in the event the Court denies the motion, an exception is granted to the plaintiffs.

Mr. Larson: So that the record may be clear as to the effect of the stipulations that have been read, the trustees do now move the Court to reopen law case Number 3391 for the purpose of receiving in evidence in that case, and the trustees do so move the Court, that the evidence in this case Number 11,640 may be received in evidence in case Number 3391 so far as consistent with the stipulations already filed and received by the Court.

Mr. Garvey: The defendant at this time objects to the admission in evidence of the stipulation as offered, and the facts as offered, on the ground that it is not in any way pertinent to any issue properly before this Court; that such evidence has to do entirely with the merits of the withholding tax assessment, as to the correctness of the determination of withholding tax liability, and the pleadings and the evidence show that the taxpayer did not file with the Commissioner of Internal Revenue any claim for refund of the claimed overpayment of withholding taxes assessed for the year 1921.

The Court: Well, I will grant the motion with the understanding that the testimony in Case Number 11,640 will be received in so far as it may be pertinent, and subject to the objections that have heretofore been indicated in the record, touching upon the competency and relevancy of such evidence.

Mr. Garvey: Exception please.

The stipulation offered and received in evidence in Case Number 11,640, omitting caption, was in words and figures as follows:

311

Stipulation.

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

In the Matter of

Minnesota and Ontario Paper Company, a corporation, Debtor.

In the Matter of the Claim of the United States of America.

In Consolidated Proceedings for Reorganization of a Corporation No. 11640.

It is hereby stipulated and agreed that the matters herein set out shall be treated by the Court and the parties as true and established, subject, however, to the reserved right of both parties to object to the materiality or relevancy of the same, and subject also to the reserved right of both parties to offer testimony or evidence in respect of other or further facts not inconsistent with the matters herein stipulated as true and established:

I.

a. Minnesota and Ontario Paper Company is a corporation organized and existing under the laws of the State of Maine. It is hereinafter referred to as the Paper Company.

b. Fort Frances Pulp and Paper Company, Limited, is a corporation organized and existing under the laws of
312 the Province of Ontario, Canada. It is hereinafter referred to as the Fort Frances Company.

c. Ontario and Minnesota Power Company, Limited, is a corporation organized and existing under the laws of the Province of Ontario, Canada. It is hereinafter referred to as the Power Company.

II.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer now are and at all times since September 29, 1934, have been, pursuant to an order of this Court that day made and entered under Section 77B of the Bankruptcy Act, the duly appointed, qualified, and acting trustees of the estate of the Paper Company, debtor. Between July 11, 1934, and said September 29, 1934, C. T. Jaffray and R. H. M. Robinson, pursuant to an order of this Court made and entered under said Act on July 11, 1934, were the duly appointed, qualified, and acting temporary trustees of the estate of the Paper Company, debtor. From November 30, 1931, until their appointment as such temporary trustees on July 11, 1934, Jaffray and Robinson were the duly appointed, qualified, and acting receivers of the Paper Company.

III.

From 1917 to 1920, inclusive, the Paper Company owned shares of capital stock in and for income-tax purposes was affiliated with the following corporations: International Lumber Company, Rainy River Improvement Company, Minnesota, Dakota and Western Railway Company, Falls
313 Lumber and Coal Company, Watrous Island Boom Company, and International Insulation Company. From 1921 to 1925, inclusive, the Paper Company owned shares of capital stock in and for income-tax purposes was affiliated with said named corporations except International Insulation Company. From 1926 to 1928, inclusive, the Paper Company owned shares of capital stock in and for income-tax purposes was affiliated with all said named corporations together with Minnesota Forest Products Company, a corporation.

During each of said three periods the annual earnings or net income of the Paper Company and its said affiliates were consolidated for income-tax purposes. All taxes paid on such consolidated earnings or net income have been paid by the Paper Company.

IV.

a. The Paper Company was organized in 1908 as the Minnesota and Ontario Power Company; its name was changed in 1918 to the Minnesota and Ontario Paper Company.

b. Upon organization the Paper Company built a newsprint mill at a power site on the Rainy River at International Falls, Minnesota. The Rainy River is part of the boundary between the United States and Canada. After a few years the output of the International Falls mill was inadequate to meet the demands of the Paper Company's customers, and steps were taken by the Paper Company to establish another newsprint paper mill on the Canadian side of the
314 power site in the Town of Fort Frances, Ontario. For that purpose the Paper Company caused the Power Company, all of whose capital stock the Paper Company then and at all times since has owned, to develop the power on the Canadian side of the Rainy River in Fort Frances, and to erect there a second newsprint paper mill, which was completed in 1914. At about the same time the Paper Company caused the Fort Frances Company to be organized to operate this second mill, and took title to all the latter's then-issued capital stock, which consisted of 500 shares; in 1920 the Fort Frances Company issued 28,100 additional shares, all of which became and have since been owned by the Power Company.

c. The newsprint paper mill at Fort Frances has ever since erection been owned by the Power Company, but has at all times been operated by the Fort Frances Company under lease from the former. The Fort Frances Company has never had any business other than the operation of said mill.

d. In addition to holding title to the newsprint paper mill the Power Company has been engaged solely in the production and sale of electric power to the Fort Frances Company and to the inhabitants of the Town of Fort Frances and of the Township of McIrvine in Canada. By far the greater proportion of the power has at all times been furnished to and consumed by the Fort Frances Company. The power site was developed by the Power Company for the purpose of supplying electric power for the operation of its
315 newsprint paper mill. The furnishing of electricity to the inhabitants was imposed as a condition of the granting of the right to develop the power site.

e. About 1909 the Paper Company, upon commencement of its newsprint manufacturing operations, organized a sales department for the purpose of selling and it did sell its prod-

ect to newspaper publishers in the Middle West of the United States. The demand for newsprint paper soon exceeded the productive capacity of the International Falls mill alone, and ever since the commencement of operations at the Fort Frances mill the newsprint paper necessary to meet this excess demand has been supplied to the Paper Company in large part by the Fort Frances Company. Prior to 1921 the paper furnished to the Paper Company by the Fort Frances Company was furnished pursuant to written contracts between them. A true copy of the contract in effect for 1920, omitting signatures, is attached as Exhibit A and by reference is made a part hereof.

f. Since 1920 there have been no written contracts respecting newsprint paper supplied to the Paper Company by the Fort Frances Company. Since the beginning of 1921 the practice of the two companies as respects newsprint paper supplied to the Paper Company by the Fort Frances Company has been as follows:

From time to time the Paper Company advises the Fort Frances Company at Fort Frances that the Paper
316 Company requires certain quantities of newsprint paper. Upon receipt of such advice the Fort Frances Company regulates manufacturing operations of the Fort Frances mill so as to turn out quantities of paper as required by the Paper Company. As the manufactured paper comes from the paper machines, it is wrapped, weighed, and delivered to railroad carriers by loading into freight cars held in readiness to receive the same on the tracks on the Fort Frances mill property. At the time of delivery of the paper to the carriers, the Fort Frances Company invoices the Paper Company for the paper then delivered. A specimen copy of an invoice used in an actual transaction is attached as Exhibit B and by reference is made a part hereof. All invoices used have been substantially identical with that shown in Exhibit B and have been filled out or completed substantially in the manner therein shown.

All shipping instructions to carriers covering paper supplied as aforesaid have been furnished and given to the carriers by the Paper Company. All transportation charges from the Fort Frances mill have been paid by the Paper Company. Practically all the paper supplied to the Paper Company has been shipped by the Paper Company into the United States. All Consumption Entry Papers (commonly known as customs papers) relating to the paper so shipped have been arranged for and signed by the Paper Company; a specimen copy of Consumption Entry Papers used in an ac-

tual transaction is attached as Exhibit C and by refer-
317 ence is made a part hereof. All Consumption Entry Papers used have been substantially identical in form with Exhibit C and have been filled out or completed substantially in the manner shown on said exhibit.

At no time has the Fort Frances Company had storage facilities for any substantial amount of manufactured newsprint paper. Its storage capacity in respect of such paper has never been in excess of approximately 100 tons. Newsprint paper has been manufactured at the Fort Frances mill only pursuant to orders for the same already in hand.

All paper manufactured at the Fort Frances mill and supplied to publishers in the United States through the Paper Company has been supplied under and pursuant to a uniform type of written agreement; a specimen copy of such written agreement is attached as Exhibit D. The Paper Company has made all financial and credit arrangements with the publishers. All accounts with the publishers have run in the name of the Paper Company, which has made all collections upon the same. The Paper Company has charged interest at the rate of 7% per annum on unpaid publishers' accounts. At no time has the Paper Company been called upon to make or has made any accounting to the Fort Frances Company in respect of publishers' accounts, financial and credit arrangements with publishers, or payments received or collected upon publishers' accounts.

g. At no time has the Fort Frances Company had any selling organization of its own. During all years since
318 and including 1921, there has been an established practice in the newsprint paper industry, in instances where the manufacturer does not have a selling organization of his own, of disposing of his product to independent distributors or selling concerns at prices which yield to the manufacturer 97% of the prevailing market price received by the independent distributors or selling concerns from the publishers or consumers.

The price charged the Paper Company by the Fort Frances Company for newsprint paper supplied to the former as stated above has at all times since the beginning of 1921 been 97% of the prevailing market price charged to the newspaper publishers.

The amount of newsprint supplied to the Paper Company by the Fort Frances Company under the practice described above from 1921 to 1927, inclusive, together with the annual total price charged the Paper Company for the same and also the average price per ton is as follows:

Year	No. of Tons	Net Credits from Sales to M & O P. Co.	Average per Ton
1921	31,194.399	$3,030,314.02	$97.14
1922	37,885.930	2,617,135.31	69.08
1923	35,066.981	2,551,124.54	72.75
1924	38,172.5015	2,743,120.50	71.86
1925	41,235.419	2,799,294.94	67.89
1926	46,888.6095	2,956,304.71	63.05
1927	62,208.5835	3,927,748.58	63.05

h. The books of both the Paper Company and the Fort Frances Company have at all times mentioned been kept on the accrual basis, and returns of income to the United
319 States Government by the Paper Company have been made on that basis. From 1921 to 1926, inclusive, neither the Paper Company nor the Fort Frances Company entered on its books any accruals in respect of any interest on unpaid balances owing for newsprint supplied to the Paper Company by the Fort Frances Company. During the year 1926 changes were made in the accounting practices of both corporations, and the Paper Company then set up on such balances, which were in the form of open accounts, accrued interest for 1925 and 1926 in favor of the Fort Frances Company. In 1927 further accounting changes were made, and in connection therewith credits were then set up on the Paper Company's books in favor of the Fort Frances Company for interest accrued on such balances owing the Fort Frances Company for 1921 to 1924 inclusive. The amounts entered as aforesaid are as follows:

Interest for Year	Year in which entered	Interest credited to account of Fort Frances Company
1921	1927	$164,525.98
1922	1927	228,928.37
1923	1927	238,371.06
1924	1927	257,143.82
1925	1926	299,172.58
1926	1926	310,593.23

The interest so credited was computed at the rate of 6% per annum. Entries corresponding to the foregoing entries made on the books of the Paper Company were made at the same time on the books of the Fort Frances Company. Copies of entries made by the Paper Company in respect of said interest credits are attached hereto as Exhibit E, which by ref-
320 erence is made a part hereof. No net amount of interest was credited in favor of the Fort Frances Company for 1927. In that year the Paper Company paid and discharged its obligation to the Fort Frances Company for all unpaid newsprint purchases, together with interest therefor on open account, by the transfer to the latter of certain

assets; no payment of the interest accruals in favor of the Fort Frances Company had been made prior to that time.

i. During 1921 to 1927, inclusive, the Paper Company owned bonds of the Power Company, issued by the latter to finance the construction of the power development and the Fort Frances newsprint mill, as well as to finance additions to said mill from time to time. Interest upon such bonds received by the Paper Company was reported to the United States Government as taxable income, and was in the amount of $210,000 for each of the years 1921 to 1924, inclusive, in the amount of $277,500 for 1925, in the amount of $300,000 for 1926, and in the amount of $390,000 for 1927.

j. The following is a statement of the interest transactions between the Paper Company and the Fort Frances and Power Companies for 1921 to 1927, inclusive, on account of the open accounts set up in respect of newsprint paper supplied to the Paper Company by the Fort Frances Company, and on account of interest on the bonds of the Power Company held by the Paper Company:

321

Year	Interest Charged to Paper Company by Ft. Frances Co. on open account	Interest credited to Paper Co. by Ft. Frances Co. on open account	Interest credited to Paper Co. by Power Co. on bonds
1921	$164,525.98	—	$210,000.00
1922	228,928.37	—	210,000.00
1923	238,371.06	—	210,000.00
1924	257,143.82	—	210,000.00
1925	299,172.58	—	277,500.00
1926	310,593.23	—	300,000.00
1927	—	$369,966.78	390,000.00

k. The above interest paid by the Paper Company to the Fort Frances Company in the year 1927 was reported by the latter for income-tax purposes to the Government of the Dominion of Canada as income received and a tax has been paid thereon by the Fort Frances Company to the Canadian Government. No income tax return of any nature and no payment of income tax of any nature was made to the United States by the Fort Frances Company in respect of the years 1921 to 1927 inclusive. Neither the Paper Company nor the Fort Frances Company reported the interest shown on Exhibit E as taxable income of the Fort Frances Company or paid a tax thereon to the United States for said Fort Frances Company.

All cash payments made from time to time from 1921 to 1927, inclusive, by the Paper Company to or for the account of the Fort Frances Company on open account were paid in Canadian funds.

In arriving at its final income-tax liability for the years 1921 to 1926, inclusive, the Commissioner, in determining the net taxable income of the Paper Company for each of said years allowed the Paper Company to offset the respective amounts of interest set forth in subparagraph j above as interest due, payable, and credited to the Fort Frances Company, against interest credited to the Paper Company by the Power Company and other Canadian subsidiaries of the
322 Paper Company, The Commissioner reduced the Paper Company's net taxable income accordingly. On July 7, 1933, the Paper Company and the Commissioner entered into a closing agreement covering income-tax liability for the years 1922 to 1928, inclusive, pursuant to Section 606 of the Revenue Act of 1928, on Commissioner's Form 866. Such of the aforesaid offsets as related to 1922 to 1926, inclusive, were reflected in the amount of tax determined for each of said years in said closing agreement.

l. In October, 1933, the Paper Company requested the Commissioner, pursuant to the provisions of Section 240 (f) of the Revenue Act of 1926 and of Section 240 (d) of the Revenue Acts of 1921 and 1924, to consolidate the accounts of the Paper Company, the Fort Frances Company, and the Power Company. The Commissioner has not acted upon said request and consolidation has not been made.

m. On February 14, 1928, the Paper Company filed a withholding-tax return on Form 1042 for the year 1927 and paid a withholding tax of $39.00 thereon. A true copy of said return is hereto attached as Exhibit F and by reference is made a part hereof.

On March 1, 1928, the Paper Company filed a withholding-tax return on Form 1042 for the year 1927, and paid a withholding tax of $12.01 thereon. A true copy of said return is hereto attached as Exhibit G and by reference is made a part hereof.

Attached to Exhibits F and G and filed with the same were returns on Form 1115 prepared by all the parties listed on said exhibits.

On March 3, 1928 the Paper Company filed two withholding-tax returns on Forms 1013 for the year 1927, and paid
323 withholding taxes thereon in the amounts of $822.75 and $11,712.92, respectively. Copies of said returns are hereto attached as Exhibits H and I, respectively, and by reference are made parts hereof.

The Paper Company filed no withholding-tax returns for the year 1927 other than Exhibits F to I, inclusive.

On July 10, 1933, the Commissioner, under the provisions of Section 3176, Revised Statutes, prepared and filed a withholding-tax return for the Paper Company reporting $1,498,734.94 paid by the Paper Company to the Fort Frances Company during the year 1927, and determining withholding tax, penalty, and interest in respect thereof in the respective amounts of $202,329.22 tax, $50,582.31 penalty, and $61,530.25 interest, and assessed against the Paper Company the total amount of $314,441.78. A copy of said return is attached hereto as Exhibit J and by reference is made a part hereof.

Not later than March 15 of each of the years 1922 to 1927, inclusive, the Paper Company filed with the Collector for the preceding year on Form 1042, its "Annual Return of Income Tax to be Paid at Source", and paid to the Collector the amount of tax shown as due thereon. Such returns were substantially similar to Exhibits F and G. In each such return no report was made or tax paid in respect of any interest paid to or accrued in favor of the Fort Frances Company upon unpaid balances for newsprint paper supplied by the Fort Frances Company to the Paper Company as aforesaid
324 and nowhere upon such return did the name of the Fort Frances Company appear.

On July 10, 1933, the Commissioner, under the provisions of Section 3176, Revised Statutes, prepared and filed a withholding-tax return for the Paper Company reporting $609,765.81 paid by the Paper Company to the Fort Frances Company during the year 1926, and determining withholding tax, penalty, and interest in respect thereof in the respective amounts of $82,318.38 tax, $20,579.60 penalty, and $29,972.90 interest, and assessed against the Paper Company the total amount of $132,870.88. A copy of said return is attached hereto as Exhibit K and by reference is made a part hereof.

On October 4, 1932, similar returns were prepared by the office of the Collector for the years 1921 to 1925, inclusive, and on July 10, 1933, the Commissioner made additional assessments of withholding taxes based on said returns for the years 1921 to 1925, inclusive, all as set forth in detail hereinafter.

The withholding tax for the year 1926 upon $310,593.23 is $41,930.08; penalty of 25% thereof would be $10,482.52. Interest on said tax computed to July 10, 1933, would be $15,269.53.

Form 1042 for all years herein mentioned has been substantially identical with Form 1042 used by the Commissioner in preparing Exhibits J and K. Form 1042 was prepared by the Commissioner.

325 n. Neither the Commissioner nor anyone else acting or purporting to act in behalf of the United States made any assessment of, issued any notice of deficiency as respects, or entered upon any proceedings to collect any withholding taxes claimed to be owed by the Paper Company by reason of the interest credits to the Fort Frances Company hereinbefore set forth until on or about July 10, 1933, at which time the Commissioner assessed against C. T. Jaffray and R. H. M. Robinson as receivers of the Paper Company withholding taxes, together with interest and penalty, as follows:

Year	Interest claimed to be subject to withholding tax	Tax thereon	Penalty 25%	Interest on tax at 6% per annum to July 10, 1933	Total tax, penalty, and int.
1921	$ 164,525.98	$ 16,452.60	$ 4,113.15	$ 10,556.14	$ 31,121.89
1922	228,928.37	28,616.05	7,154.01	16,643.35	52,413.41
1923	238,371.06	29,796.38	7,449.10	15,542.07	52,787.55
1924	257,143.82	32,142.98	8,035.75	15,560.72	55,739.45
1925	299,172.58	37,396.57	9,349.14	15,860.24	62,605.95
1926	609,765.81	82,318.38	20,579.60	29,972.90	132,870.88
1927	1,498,784.94	202,329.22	50,582.31	61,530.25	314,441.78
	$3,296,842.56	$429,052.18	$107,263.06	$165,665.67	$701,980.91

o. Against the assessment of $31,121.89 for withholding taxes, penalty, and interest for 1921, the Commissioner on

July 20, 1933, applied as a credit the amount of $30,810.46, consisting of $24,034.76 interest on an overpayment of income taxes by the Paper Company for the year 1922, $1,235.69 interest on such an overpayment for the year 1923, $3,038.92 interest on such an overpayment for the year 1924, and $2,501.09 interest on such an overpayment for the year 1925.

326 p. Of the amount of $701,980.91 assessed as stated in subparagraph m above, the balance of $671,170.45 remaining after deduction of $30,810.46 as set out in subparagraph o above is the claim filed by the United States in this proceeding.

q. The amount of $609,765.81 upon the basis of which the Commissioner assessed withholding taxes for 1926, as set out in subparagraph n above, consists of the sum of the $299,172.58 entered on the books of the Paper Company for 1925 and the $310,593.23 entered on the books of the company for 1926. The amount of $1,498,734.94 upon the basis of which the Commissioner assessed withholding taxes for 1927, as set out in subparagraph n above, consists of the sum of the amounts upon which the Commissioner has computed withholding taxes for each of the preceding years 1921 to 1926 inclusive, which is shown as follows:

Year for which interest was credited	Amount subjected to tax in 1927 as for 1927
1921	$164,525.98
1922	228,928.37
1923	238,371.06
1924	257,143.82
1925	299,172.58
1926	310,593.23
	$1,498,734.94

327

ARTHUR W. CARNDUFF,
HERBERT S. FESSENDEN,

GEORGE F. SULLIVAN,
U. S. Dist. Atty.

JOHN E. GARVEY,
Special Assistant to the Attorney General.
Attorneys for the United States of America and for the United States Collector of Internal Revenue for the District of Minnesota.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for the Paper Company.

Cobb, Hoke, Benson, Krause & Faegre,
Of Counsel.

Dated April 30th, 1936.

---

228 Exhibit A.

Memorandum of Agreement made by and between Fort Frances Pulp & Paper Company, Limited, hereinafter called "Fort Frances Company", and Minnesota & Ontario Paper Company, hereinafter called "Minnesota Company".

Witnesseth, the Fort Frances Company hereby agrees to sell and the Minnesota Company hereby agrees to buy Thirty Thousand (30,000) tons, more or less, of newsprint paper during the calendar year of 1920, subject to the following conditions:

(1) Delivery of the paper to the Minnesota Company shall be made on board cars at Fort Frances, Ontario;

(2) The price shall be adjusted from month to month and shall be a price equal to the average price at which the Minnesota Company may sell paper during the month, less a discount of 5%;

(3) Causes beyond the control of either party, such as strikes, fires, casualties at the mills, or other difficulties which make it impossible to fulfill the requirements of this contract, shall suspend it during the existence of such disability.

Executed in triplicate at Fort Frances, Ontario, this 1st day of January, 1920.

FORT FRANCES PULP & PAPER CO. LTD.,

By .....,
Vice-President.

MINNESOTA & ONTARIO PAPER COMPANY,

By .....,
Vice-President.

Exhibit B

Fort Franc[illegible] Pulp & Paper Compe[illegible]y, Ltd.

Fort Frances, Ont., Dec. 22, 1923. 192

Sold To
MINNESOTA & ONTARIO PAPER CO.
International Falls, Minn.

Car No.		Rolls Newsprint	Pounds	At Per Cwt.	Value
Sou	159422	39	54572	$3.75	$2046
Soo	34316	88	62228	"	2334
C&NW	141678	80	49934	"	1835
			166734		$6215
				2½% Can. Ex. Tax	140
				Total $	$6355

Newsprint Par. 1678-Free

Certified Correct
MINNESOTA & ONTARIO PAPER CO.
Per [signature]
Agent for Importer.

329

283

TREASURY DEPARTMENT
Cust. Form 3067-A
T. D. 38880
O. Apr. 17-28

U. ED STATES CUSTOMS SERVICE

Exhibit C

DECLARATION OF NOMINAL CONSIGNEE, PURCHASER, OR ULTIMATE CONSIGNEE

(THIS DECLARATION MUST BE PRESENTED TO THE COLLECTOR OF CUSTOMS AT PORT OF ENTRY WITHIN NINETY DAYS AFTER DATE OF BOND.)

DECLARATION OF NOMINAL CONSIGNEE.

I, the undersigned, herewith declare that the consignee who made the entry covering the merchandise described below is not the actual owner or ultimate consignee of the said merchandise, but that such entry exhibits a full and complete account of all the merchandise imported in the vessel indicated

.....

by .....

of address .....

except

I also declare to the best of my knowledge and belief that all statements appearing in the entry and in the invoice or invoices and other documents presented therewith and in accordance with which the entry was made, are true and correct in every respect; that the entry and invoices set forth the true prices, values, quantities, and all information as required by the laws and the regulations made in pursuance thereof; that the invoices and other documents are in the same state as when received; that I have not received and do not know of any other invoice, paper, letter, document, or information showing a different currency, price, value, quantity, or description of the said merchandise; and that if at any time hereafter I discover any information showing a different state of facts, I will immediately make the same known to the Collector of Customs at the port of entry.

I further declare, if the merchandise was entered by means of a sight or draft basis invoice, that no agreement (written or verbal) or understanding exists between me and the seller or shipper of any of the merchandise covered by the said entry or any other person whereby the proceeds due to owners thereof may be remitted, and that if received by means of a commodity of the value or the price paid in the form of an invoice it is common seller's, shipper's, and certified invoices ready to be presented at this time.

☐ Principal.
☐ Member of the firm.
☐ ..... of the corporation.
(Title.)

(Signature.)

(Address.)

Declared to before me this ..... day of .....
19..., at the port of .....

Notary Public.

Deputy Collector.

DECLARATION OF PURCHASER.

I, the undersigned, representing

MINN. & ONT. PAPER CO.,

address Int'l Falls, Minn.

in the capacity indicated herein, declare that they are the owners of the merchandise covered by the entry described above, and that they will pay all additional and dumping duties imposed by Section 201, paragraph B, of the Tariff Act of 1922, and that such entry exhibits a full and complete account of all the merchandise imported by them in the vessel indicated and obtained by them in pursuance of a purchase, or an agreement to purchase, except

I also declare to the best of my knowledge and belief that all statements appearing in the entry and in the invoice or invoices and other documents presented therewith and in accordance with which the entry was made, are true and correct in every respect; that the entry and invoices set forth the true prices, values, quantities, and all information as required by the laws and the regulations made in pursuance thereof; that the invoices and other documents are in the same state as when received; that I have not received and do not know of any other invoice, paper, letter, document, or information showing a different currency, price, value, quantity, or description of the said merchandise; and that if at any time hereafter I discover any information showing a different state of facts, I will immediately make the same known to the Collector of Customs at the port of entry.

I further declare, if the merchandise was entered by means of a sight or draft basis invoice, that no agreement (written or verbal) or understanding exists between me and the seller or shipper of any of the merchandise covered by the said entry or any other person whereby the proceeds due to owners thereof may be remitted, and that if received by means of a commodity of the value or the price paid in the form of an invoice it is common seller's, shipper's, and certified invoices ready to be presented at this time.

(Signature.) ☒ Principal. ☐ Member of the firm. ☐ ..... of the corporation. (Title.) Asst. Treas.

Int'l Falls, Minn.
(Address.)

Declared to before me this 28th day of Dec.
19 27, at the port of Int'l Falls, Minn.

Notary Public.

Deputy Collector.

DECLARATION FOR MERCHANDISE OBTAINED OTHERWISE THAN BY PURCHASE OR AGREEMENT TO PURCHASE.

I, the undersigned, representing .....

.....

address .....

in the capacity indicated herein, declare that they are the ultimate consignee of the merchandise described in the foregoing declaration below, and that they will pay all additional and dumping duties imposed by Section 201, paragraph B, of the Tariff Act of 1922, and that such entry exhibits a full and complete account of all the merchandise imported by them in the vessel indicated and obtained by them otherwise than in pursuance of a purchase, or an agreement to purchase, except

I also declare to the best of my knowledge and belief that all statements appearing in the entry and in the invoice or invoices and other documents presented therewith and in accordance with which the entry was made, are true and correct in every respect; that the entry and invoices set forth the true prices, values, quantities, and all information as required by the laws and the regulations made in pursuance thereof; that the invoices and other documents are in the same state as when received; that I have not received and do not know of any other invoice, paper, letter, document, or information showing a different currency, price, value, quantity, or description of the said merchandise; and that if at any time hereafter I discover any information showing a different state of facts, I will immediately make the same known to the Collector of Customs at the port of entry.

I further declare, if the merchandise was entered by means of a sight or draft basis invoice, that no agreement (written or verbal) or understanding exists between me and the seller or shipper of any of the merchandise covered by the said entry or any other person whereby the proceeds due to owners thereof may be remitted, and that if received by means of a commodity of the value or the price paid in the form of an invoice it is common seller's, shipper's, and certified invoices ready to be presented at this time.

☐ Principal.
☐ Member of the firm.
☐ ..... of the corporation.
(Title.)

(Signature.)

(Address.)

Declared to before me this ..... day of .....
19..., at the port of .....

Notary Public.

Deputy Collector.

Entry No. ..... Consignee ..... Vessel from ..... Date 192

NUMBER OF ACKAGES	SELLER OR SHIPPER	PLACE AND COUNTRY OF SHIPMENT	AMOUNT PAID OR AGREED TO BE PAID IN FOREIGN CURRENCY	RATE OF EXCHANGE	APPRAISED VALUE, FOREIGN CURRENCY	APPRAISED VALUE, U. S. DOLLARS
2 cars	Ft.Fos.P.&P.Co.Ltd., (Newsprint Paper)	Winnipeg, Man.	$ 6216			$ 6216

Mailing address of Nominal Consignee, Purchaser, or Ultimate Consignee:

MINN. & ONT. PAPER CO.,

Int'l Falls, Minn.

330

285

TREASURY DEPARTMENT
Customs Form 7501
Treas. Dept.
C. S. Aug. 1925

Copy f. ..... Exhibit ~~6~~ C page 2.
(Collector, naval officer, statistician, etc.)

I. T. No. .....
Port from .....
Via .....
(Bonded carrier.)

CONSUMPTION ENTRY

Permit Customs Form 7501A, and triplicate copy for statistical purposes, to be presented with entry.

UNITED STATES CUSTOMS SERVICE

Collection District No. 36

Port of Int'l Falls, Minn. Entry filed Dec. 28, 1925., 192

This space for number and date of entry.

Dec. 28, 1925.

Merchandise imported by MINN. & ONT. PAPER CO.

Arrived on the M. D. & W. Ry. (Name of importing vessel or carrier. If vessel, give flag and motive power.) on Dec. 28, 1925., 192 (Date of original importation.) from Canada

MARKS AND NUMBERS.	MERCHANDISE. PACKAGES AND DESCRIPTION.		VALUE IN FOREIGN MONEY.	ENTERED VALUE IN U. S. MONEY.	RATE.	DUTY. Dollars.	DUTY. Cts.
		Quantity		Dollars only			
Invoice No.	U1888 Date ....., 192, Place 47211						
Sou 159488	99 Rolls Newsprint Paper	54572		$2046	Free	None	
Sou 24516	68 do	62230		2334	"	"	
CRFW 141678	80 do	48224		1835	"	"	
		165726		$6215			
		2½% Com. Ex. Tax		140			
				$6355			

Number of invoices ..... W. H. Entry No. ..... G. O. No. .....

I do truly declare that MINN. & ONT. PAPER CO., Address Int'l Falls, Minn.
(Name of owner, purchaser, or ultimate consignee.) (No.) (Street.) (City.) (State.)

is the Owner, Purchaser, or Ultimate Consignee of the merchandise described in this entry, and in the invoice or invoices now presented to the Collector of Customs, and that the said merchandise was imported on the date and by the vessel or conveyance of the port named above; that the invoice or invoices are in the sole, in which I received them, except as to marginal corrections; that I have not received and do not know of the existence of any other invoice, writing, paper, or agreement showing a different price, value, or description of the said merchandise, and that if at any time hereafter I shall receive any error or misstatement in the invoice or invoices now presented, or receive any information, or any invoice, paper, or writing showing a different price, cost, or value, I will immediately make the same known to the Collector of Customs at the port of entry; and I further declare if this declaration is executed by the or owner, purchaser, or ultimate consignee, that the said invoice or invoices are in all respects correct and true and truly state the price paid or to be paid for all of said merchandise or last bona fide purchase agreed to be purchased; and if this declaration is executed by an agent, that all of the statements contained herein are correct and true to the best of my knowledge, information, and belief.

Sworn to and declared before me

at Int'l Falls, Minn. this 28. day of Dec. 1925.

W. H. Loughlan
(Deputy collector of customs, notary public.)

MINN. & ONT. PAPER CO.,
(Signature of owner, purchaser, or ultimate consignee.)

Asst. & Ass't y
(Signature of agent.)

33 Penalty
(Title of officer of corporation, member of firm, or agent.)

287

Exhibit 8

MEMORANDUM OF AGREEMENT made and entered into by and between

Minnesota & Ontario Paper Company

a corporation organized and existing under and by virtue of the laws of the State of Maine, hereinafter called the Seller, and

of

hereinafter called the Purchaser.

WITNESSETH: That for and in consideration of the sum of One Dollar ($1.00) and other good and valuable considerations by each to the other in hand paid and the mutual covenants and agreements hereinafter set forth, the Seller agrees to sell and deliver and hereby does sell and the Purchaser agrees to buy and pay for and hereby does buy

tons of roll news print paper each and every year for the period of ten (10) years, commencing January 1st, 1921 and ending December 31st, 1930, both days inclusive, to be used for printing editions of

deliverable in ordered lots only, throughout each month at Seller's convenience, in monthly installments of approximately

tons, but cumulative, at the price and upon the terms herein specified, and the Seller is hereby specifically authorized to ship the above named monthly tonnage each month during the period covered by this contract, provided, that there may be an accumulation of paper from month to month in order to make up carload lots.

1. **SPECIFICATIONS.** (a) The paper shall be substantially of the standard of quality of news-print paper manufactured by the Seller, and of approximately the following basis of weight: 32x48-24 500, at mill, with a leeway of one pound up or down on average weight of all paper shipped hereunder. It shall be manufactured at the mills of Minnesota & Ontario Paper Company at International Falls, Minnesota, or Port Frances Pulp & Paper Company, Ltd. at Port Frances, Ontario, or at other mills, at the option of the Seller.

(b) The Purchaser shall furnish to the Seller, by the 15th of each month, complete specifications of the different widths of rolls hereafter specified in Section (d) for shipments to be made the succeeding month, but if in any month no specifications are furnished by the Purchaser, the Seller may ship any of the widths specified in Section (d).

(c) Diameter of rolls shall be approximately 30 inches.

(d) Width of rolls shall be:

2. **PRICE:** The price, f. o. b. cars at mill, on gross weight of rolls, including paper but excluding cores, shall be the "average Eastern price", determined for each period as hereinafter provided, plus Forty Cents per one hundred pounds during the years 1921 and 1922 and such "average Eastern price" plus Fifteen Cents per one hundred pounds during the years 1923 to 1930, both inclusive. The "average Eastern price" for each six months of the years 1921, 1922 and 1923 shall be determined by ascertaining the announced standard contract price to publishers in the United States, for news print paper sold under regular contracts, effective in January and July of the half year in question, of each of the following: International Paper Company; the G. H. Mead Company, for paper from the Rock Rin, Maine mill of the Spanish River Pulp and Paper Company, Limited, (in the event the G. H. Mead Company fails to sell paper in the United States from said mill, then the Spanish River Pulp and Paper Company, Limited, for paper therefrom); and the Canadian Export Company, Limited, for paper from the East Angus Mill of the Brompton Pulp and Paper Company, Limited, (in the event the Canadian Export Company, Limited, fails to sell paper in the United States from said mill, then the Brompton Pulp and Paper Company, Limited, for paper therefrom); and taking the average thereof by adding such three prices together and dividing the sum thereof by three. The "average Eastern price" for each of the years succeeding 1923 to 1930, both inclusive, shall be determined by ascertaining the announced standard contract price to publishers in the United States, for news print paper sold under regular contracts, effective in January of the year in question, of each of the foregoing (three) companies or mills and likewise taking the average thereof by adding such three prices together and dividing the sum thereof by three.

(a) In the event that any of the foregoing companies or mills (or any subsidiary company or mill hereafter) shall cease to sell paper in the United States during the period of this contract, the Seller shall name another company or mill as substitute therefor.

(b) In the event of any dispute between the parties as to the "average Eastern price" described herein, the same shall be determined by arbitration, each party hereto appointing one arbitrator and the two arbitrators so chosen appointing the third, the decision of a majority of whom shall be binding upon the parties hereto; pending such arbitration, however, the full price claimed shall be paid by the Purchaser as required by the Seller, to be subsequently readjusted in accordance with the finding of the arbitrators.

(c) Any government tax or duty imposed upon the sale, transportation or importation of the paper to be furnished hereunder shall be assumed and paid by the Purchaser in addition to the price named as above.

3. **TERMS:** Not each not later than the 15th of the month for all paper shipped the previous month, net cash thirty days from date of invoice—subject to the right reserved by Seller to file only with right draft attached to Bill of Lading. Interest at rate of Seven per cent per annum shall be paid on all amounts remaining unpaid after due date. Payments shall be made in New York, Chicago or Minneapolis exchange.

4. **DELIVERY AND TONNAGE:** Delivery shall be on board cars at point of manufacture. Routing is reserved to Seller.

The Seller may from time to time, by notice mailed to the purchaser on or before the tenth day of any month, increase the monthly installment for the succeeding month or specified months by not more than fifteen per cent and the tonnage to be delivered hereunder shall thereupon be correspondingly increased.

The Purchaser may from time to time, by notice mailed to the Seller on or before October 1st of any year, reduce the tonnage for the next succeeding year to, but not below, the actual requirements of news print paper for that year. The tonnage annually deliverable in succeeding years, however, shall be as herein provided unless the Purchaser shall again similarly reduce the same for any other year.

In the event that at any time during the period of this contract the Purchaser shall require news print paper in addition to the tonnage herein provided, the Purchaser shall first offer in writing to buy the same of and from the Seller under the terms of this agreement; and the Purchaser hereby specifically covenants and agrees not to buy paper of or from any other than the Seller unless and until it has so offered to buy the same from the Seller under the terms hereof and the Seller has declined to furnish it.

5. **CORES:** Cores may be either iron or paper at the option of the Seller. Iron cores shall be paid for by the Purchaser at Four Cents per inch and Paper Cores at Two Cents per inch. Upon return of the same to the Seller at mill from which shipped, with freight and any other charges prepaid, in good condition, within ninety days from the receipt thereof by the Purchaser, the Seller agrees to pay to the Purchaser an amount equivalent to the price paid therefor by Purchaser to Seller.

6. **CLAIMS:** No allowance shall be made for waste or damaged paper or for paper left on cores.

In case of claim of any nature arising on any shipment under this contract, the Purchaser shall notify the Seller thereof by writing within fifteen days after receipt of such shipment at destination, and in case of failure so to do the Purchaser shall be deemed to have waived such claim.

No claim by the Purchaser for consequential damages shall be made or allowed, any and all claims for such damages being hereby expressly waived by the Purchaser.

282

Exhibit "D"
page 8

7. **CONTINGENCIES:** In the event of war, revolution, insurrection or public disturbance in or involving the United States or Canada, or of fire, storm, flood, low water, strike, lockout, combination of workmen, accident, embargoes, delay, refusal or failure of carriers or contractors, governmental interference, injunction or other court process, act of Providence, or any cause whatsoever beyond the control of the Seller, discontinuing or interfering with the normal monthly production of the paper herein described at the combined mills of the Minnesota & Ontario Paper Co. and Port Frances Pulp & Paper Co., Limited, (which normal monthly production it is agreed shall be computed on the basis of 550 tons per working day), or the supply or transportation of any material employed in or about the manufacture of said paper, deliveries under this contract may be suspended in whole or in part during the period required to remove the cause or repair the damage, and the total quantity deliverable under this contract may be reduced in proportion to the decrease in the normal monthly production of paper, and the parties hereto shall be relieved of liability with respect thereto.

8. **CANCELLATION:** If the Purchaser shall fail to make any payment when due or to pay at maturity any note given in settlement or on account, or shall fail to accept and pay any draft drawn by the Seller for all or any part of the purchase price, or shall fail to fulfill any provision of this contract, and such default shall continue for thirty days, the Seller may, at its option, cancel this contract by mere notice in writing, refuse to furnish any more paper hereunder and declare all obligations of the Purchaser for all paper furnished hereunder due forthwith notwithstanding any other terms hereof; provided, however, that the Purchaser shall be and remain liable to the Seller for all loss and damage sustained by reason of such failure or breach, and because of the difficulty of ascertaining the loss or damage which the Seller may incur by any breach or the failure of the Purchaser to take paper as herein contracted for, the sum of Fifty Cents for each one hundred pounds of paper remaining undelivered hereunder is hereby agreed upon and fixed as liquidated damages on account thereof, which the Purchaser hereby covenants and agrees to pay the Seller as such liquidated damages.

9. **THE PARTIES HERETO EXPRESSLY RELEASE EACH OTHER** from any and all claims arising or which may arise on behalf of either party against the other by reason of any proceedings under the terms of an agreement between the Attorney General of the United States, as Trustee, and the Seller and certain other manufacturers of newsprint paper, dated November 20th, 1917.

It is further understood and agreed that the seller has offered paper to the Purchaser in accordance with the provisions of said agreement; that this Contract is made with full knowledge on the part of the Purchaser of the provisions of said agreement, that the Purchaser hereby expressly waives the benefit of any and all the provisions of said agreement and represents that the Purchaser desires to make this contract regardless of said agreement; that in entering into this Contract the Purchaser is acting in the Purchaser's own interest; and that this Contract is entered into by the Seller at the sole request of and in deference to the wishes of the Purchaser.

10. **THIS CONTRACT** is executed and delivered in duplicate original in Minnesota; it is complete in itself and sets forth the agreement and conditions between the parties hereto; it shall be construed to be a Minnesota Contract and according to the laws of the State of Minnesota; and shall bind and inure to the benefit of the successors and assigns of the parties hereto respectively, except that it shall not be assigned by either party save by consent in writing duly executed by an authorized officer of the other. No alteration, change or modification shall at any time be made in this Contract except after action by the executive officers of the Seller evidenced by a written endorsement hereon signed by one of said officers.

This Contract is subject to approval by an executive officer of the Seller by written endorsement in Minnesota and shall not be binding on the Seller unless and until so approved; and it will not be considered for approval unless it is signed in duplicate by the Purchaser and received by the Seller within ten days from the date hereof.

Dated and delivered at International Falls, State of Minnesota, this

day of 1930.

MINNESOTA & ONTARIO PAPER COMPANY

By

By

Signed and approved at International Falls, Minn.

MINNESOTA & ONTARIO PAPER COMPANY.

By

Vice-President.

MINNESOTA & ONTARIO PAPER COMPANY

TO

THE

Uniform

Sales Agreement

1921-1930

291

334

Exhibit E

Journal Voucher

MOP 15 No. 435

Minnesota and Ontario Paper Co.

Date: May 22, 1926

Debits General and Operating Acc'ts.	Folio	Description	Folio	Credits as of Dec. 31, 1925 Credits General and Operating Accounts	Sundry Ledger
299,172.58	A	Surplus Account			
		To Sundry Ledger			
		Fort Frances Pulp & Paper Co. Ltd. A/C			299,172.58
		Crediting Fort Frances Pulp & Paper Co. Ltd. with interest on average monthly balance @ 6% per annum from Dec. 1, 1924 to Dec. 31, 1925 computed as follows:			
				Balance	
		Dec. 31, 1924		4,649,361.69	
		Jan. 31, 1925		4,442,984.72	
		Feb. 28, 1925		4,788,321.86	
		Mar. 31, 1925		4,792,187.57	
		Apr. 30, 1925		4,797,691.07	
		May 31, 1925		4,708,329.49	
		June 30, 1925		5,004,055.89	
		July 31, 1925		5,117,259.04	
		Aug. 31, 1925		5,155,098.85	
		Sept. 30, 1925		5,257,410.22	
		Oct. 31, 1925		5,283,928.35	
		Nov. 30, 1925		5,338,836.18	
		Dec. 31, 1925		5,485,261.58	
			13)	64,820,726.51	
		Average Balance		4,986,209.73	
		Interest @ 6% per annum		299,172.58	

335

MOP 15 No. 1214

Journal Voucher

Date: December 1926

Minnesota & Ontario Paper Co.

Debits General and Operating Accts.	Folio		Folio	Credits Sundry Ledger
310,593.23	A	Interest Paid.		
		Fort Frances Pulp & Paper Co. Ltd.	C	310,593.23
		Crediting Fort Frances Pulp & Paper Co. Ltd. with interest at 6% per annum for year 1926 on average credit balance of Minnesota & Ontario Paper Co. as per details in working papers.		

336

Journal Voucher

MOP 15 No. 279

Minnesota & Ontario Paper Co.

Date: May 31, 1927

Debits General and Operating Acc'ts.	Folio	Description	Folio	Credits General and operating acc'ts.
888,969.23	A	Private Ledger		
		Surplus account		
		To	a/c	888,969.23
		Sundry Ledger		
		Fort Frances Pulp and Paper Co.		
		To credit Fort Frances Pulp and Paper Company Limited with interest at 6% accrued on indebtedness of Minnesota and Ontario Paper Co. Ltd. for years 1921, 1922, 1923 and 1924 as per schedule on file.		
		Year 1921		164,525.98
		1922		228,928.37
		1923		238,371.06
		1924		257,143.82
				888,969.23

Exhibit F
Sec of Def 1

Form 1042
U. S. Internal Revenue

Collector will stamp here the date of filing of the return in red unless dated by resolution.

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

For Calendar Year 1927

Do not write in this space

PAYMENT

$ 4

(Cashier's Stamp)

CASH CHECK P. O.

Received 1928

By

This return must be made to the Collector of Internal Revenue for the district in which the withholding agent is located, on or before March 15, 1928, and the tax owed has been paid on or before March 15, 1928.

Minneapolis & Ontario Paper Company
(Name of withholding agent)

1100 Builders Exchange Building
(Address in full)

Minneapolis, Minnesota
(City, State, and Number)

RETURN AUDITED

This return is required to be made by all individuals, corporations, and partnerships, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds), rents, salaries, wages, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 216 (a) of the Revenue Act of 1926) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payors of such income are required to withhold and deduct a tax therefrom at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 13½ per cent when paid to foreign corporations.

A nonresident alien individual is entitled to the personal exemption of $1,000, and, in addition, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1115 with his employer not later than February 1 of the succeeding year. By filing Form 1115 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable to compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year 1927.

INCOME RECEIVED MAR 17 1928 SORTING SEC.

Rate	Amount Paid	Tax Withheld
1½%	$ 1500 00	$ 22 50
3%	$	$
5%	$	$
13½%	$	$
Totals	$	$

A. A. Thompson
(Signature)

Assistant Auditor
(Capacity in which acting)

Minneapolis & Ontario Paper Co.

Number of Claims for Credit, Form 1115, attached to this return 2

Sworn to and subscribed before me this 13th day of February, 1928.

E. M. VERRICK
(Signature) Notary Public (Title)
My commission expires [illegible]

Name of Individual, Partnership, or Corporation to Which Paid	Address in Full	Amount of Income Paid	Exemptions and Credits (Amount Col. 3)	Amount Taxable	Amount of Tax Withheld
Melville Brestan	% Minneapolis and Ontario Paper Co. International Falls Minnesota	$ 1500 00	$ 1500	$ 300 00	$ 22 50
E. M. Ruckenson	Dill	2700 00	1700	1000 00	150 00
John Learmonth	Otto	3000 00	1500	1500 00	225 00
Totals		$ 7500 00	$ 4700	$ 2800 00	$ 397 50

337

EXHIBIT F. 295

Exhibit F
Sheet No. 2
Ex - 7

Form 1042
U. S. Internal Revenue

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

For Calendar Year 1927

Do not write
PAID

$ _____
(Collector's Signature)

CASH CHECK M.O.
Received
By

This return must be made by the Collector of Internal Revenue for the district in which the withholding agent is located, or if there is no collector in charge of such district, then to the collector at the place where the withholding agent is required by law to file his income tax return.

Minnesota & Ontario Paper Company
(Name of withholding agent)
1160 Builders Exchange Building
(Address in full)
Minneapolis Minnesota

RETURN AUDITED

INSTRUCTIONS

This return is required to be made by all individuals, corporations, and partnerships, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds), rents, salaries, wages, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 216 (a) of the Revenue Act of 1926) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payors of such income are required to withhold and deduct a tax therefrom at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 13½ per cent when paid to foreign corporations.

A nonresident alien individual is entitled to the personal exemption of $1,000, and, in addition, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1115 with his employer not later than February 1 of the succeeding year. By filing Form 1115 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable to compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year 1927.

Rate	Amount Paid	Tax Withheld
13½%	$ 1,015.11	$ 0
5%	$	$
3%	$	$
1½%	$	$
Totals	$ 1,015.11	$ 0

A. A. Shepard
(Name)
Assistant Secretary
Minnesota & Ontario Paper Co.
(Capacity in which acting)

Number of Claims for Credit, Form 1115, attached to this return (11) 12

Sworn to and subscribed before me this 13th day of February, 1928.

E. M. Merrick
(Signature)

E. M. MERRICK
Notary Public, Hennepin County, Minn.
My commission expires (illegible)

Name of Individual, Partnership, or Corporation to whom Paid	Address in Full	Amount of Income Paid	Rate	Tax Withheld	Amount Tax Withheld
J. D. Beaumont	Int. Paper Co.	$ 375.00	13½%	$ 1500	$ 0
R. Kynard	"	1250.00	"	1500	0
A. A. Mallory	"	2100.00	"	3100	0
Estelle Gagné	"	1200.00	"	1500	0
F. A. Thompson	"	1100.00	"	1500	0
D. B. Mitchell	"	446.75	"	2300	0
W. W. De Lake	"	65.00	"	2300	0
H. A. Robertson	"	1500.00	"	2300	0
Evelyn Parker	"	562.00	"	1500	0
C. D. Beaumont	"	40.00	"	3100	0
E. W. Turney	"	1100.00	"	3900	0
Totals		$ 1,015.11		$ 2,100	$ 0

297

Exhibit G
Sheet No. 1.

Form 1042
U. S. Internal Revenue

Collector will stamp here the date of filing if the return is not accompanied by remittance.

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

For Calendar Year 1927

Do not write in this space
PAYMENT
$.....
(Cashier's Stamp)

SEP 4 1928

CASH CHECK M. O.
Received
By

This return must be made by the Collector of Internal Revenue for the district in which the withholding agent is located, on or before March 15, 1928, and the tax withheld must be paid at or before Form 1042, filed.

MINNESOTA & ONTARIO PAPER COMPANY
(Name of withholding agent)
1100 BUILDERS EXCHANGE BLDG.
MINNEAPOLIS, MINNESOTA.
(Address in full)

RETURN AUDITED

This return is required to be made by all individuals, corporations, and partnerships, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds, notes, coupons, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 216 (d) of the Revenue Act of 1926) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payors of such income are required to withhold and deduct a tax therefrom at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 15½ per cent when paid to foreign corporations.

RECEIVED APR 19 1928 IRD

A nonresident alien individual is entitled to the personal exemption of $1,500, and, if married, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1113 with his employer [illegible] January 1, of the succeeding year. By filing Form 1113 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable to compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year 1927.

A. A. Ferguson
(Signature)
Assistant Auditor.
(Capacity in which acting)

Rate	Amount Paid		Tax Withheld	
1½%	$ 7300	87	$ 12	01
3%	$		$	
5%	$		$	
15½%	$		$	
Totals	$ 7300	87	$ 12	01

Number of Claims for Credit, Form 1113, attached to this return 3

Sworn to and subscribed before me this 29th day of February, 1928.

[illegible]
(Signature)
Notary Public Hennepin County, Minn.
My commission expires Oct. 27th, 1929
(Title)

Name of Individual, Partnership, or Corporation to Which Paid	Address in Full	Amount of Income Paid		Exemptions and Credits (Attach Form 1113)	Amount Taxable		Amount of Tax Withheld	
Peter Hegg	Fort Frances, Ont. 321 - 1st St.	$ 2476	18	$ 2300.	$ 176	18	$ 2	64
Mike Haley	Ft. Frances, Ont.	2724	69	2700.	24	69		37
P. Van Aletyne	Ft. Frances, Ont.	2100	00	1500.	600	00	9	00
Totals		$ 7300	87	$ 6500.	$ 800	87	$ 12	01

339

C

EXHIBIT G

O - 2-1 Ex. 127-A

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

SUPPLEMENTARY **For Calendar Year 1927**

$ _____
(Collector's Stamp)

MINNESOTA & ONTARIO PAPER COMPANY
(Name of withholding agent)
1100 BUILDERS EXCHANGE BLDG.
MINNEAPOLIS, MINNESOTA.
(Address in full)

CASH CHECK M.O.
Received
By _____

RETURN AUDITED

INSTRUCTIONS

Every withholding agent, whether individual, corporation, or partnership, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds), rents, salaries, wages, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 216 (a) of the Revenue Act of 1926) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payers of such income are required to withhold and deduct a tax thereform at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 13½ per cent when paid to foreign corporations.

A nonresident alien individual is entitled to the personal exemption of $1,000, and, in addition, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1111 with his employer not later than February 1 of the succeeding year. By filing Form 1111 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year 1927.

A. A. Fagen
(Signature)
Assistant Auditor
(Capacity in which acting)

Rate	Amount Paid	Tax Withheld
1½%	$ 29751 24	$ None
3%	$	$
5%	$	$
13½%	$	$
Totals	$ 29751 24	$ None

Number of Claims for Credit, Form 1114, attached to this return 16

Sworn to and subscribed before me this 29th day of February, 1928.

(Signature) Notary Public, Hennepin County, Minn.
My commission expires Oct. 25, 1928
(Title)

Name of Nonresident Individual, Partnership, or Corporation to Whom Paid	Address in Full	Amount of Income Paid	Exemptions and Credits (Check Form 1114)	Amount Taxable	Amount of Tax Withheld
Kawiuk, John	Fort Frances, Ont.	$ 2025 96	$ 3100.	$ None	$ None
Mylnechuk, John	Fort Frances, Ont.	1748 10	1900.	"	"
Fallberg, C. V.	772 Crowe Ave., Fort Frances, Ont.	1951 01	3100.	"	"
Hutchings, Herb.	418 - 2nd St. Fort Frances, Ont.	1617 96	1900.	"	"
Gray, R.	804 Scott St. Fort Frances, Ont.	1584 99	2300.	"	"
McCutcheon, John	432 - 1st St. Fort Frances, Ont.	1860 00	2700.	"	"
Benedict, Frank	525 Nelson St. Ft. Frances, Ont.	1804 12	3900.	"	"
Benedit, Jos.	309 Portage Ave., Fort Frances, Ont.	2116 34	2300.	"	"
Warren, Emmett	Fort Frances, Ont.	1531 35	2300.	"	"
Plumridge, A. L.	Fort Frances, Ont.	1635 49	3100.	"	"
Galbraith, Wm. D.	530 Scott St. Fort Frances, Ont.	1860 00	2700.	"	"
Boileau, J. B. Sr.	223 - 3rd St. E. Fort Frances, Ont.	2400 00	3500.	"	"
Boonuk, Mike	Fort Frances, Ont.	1756 39	1900.	"	"
Saxton, A. E.	Fort Frances, Ont.	1800 00	3900.	"	"
Terse		$ 25691 61	$ 38,600	$ None	$ None

340

201

Exhibit G
Sheet No. 3

CONTINUATION SHEET FOR FORM 1066 L.A.-7

Name of Individual, Partnership, or Corporation to whom Paid	Address in full	Amount of Income Paid		Expenditure and Credits	Amount Taxable		Amount of Tax Withheld	
Markoski, Nick	Fort Frances, Ont.	$1833	69	$ 2300.	$ None		$ None	
Gustafson, C.	1005 - 2nd St. Ft. Frances, Ont.	2225	94	3500.	"		"	
	Total -	4059	63	5800.	"		"	

303

EX. - H

Form 1013
U. S. INTERNAL REVENUE

Collector will stamp here the date of filing if the return is not accompanied by remittance.

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON INTEREST DERIVED FROM BONDS AND SIMILAR OBLIGATIONS OF DOMESTIC AND RESIDENT CORPORATIONS

For Calendar Year 1927

6% Gold Notes

Do not write in this space

PAYMENT

$ .....

(Cashier's Stamp)

Minnesota and Ontario Paper Company
(Name of debtor organization)

1100 Builders Exchange Bldg., Minneapolis, Minn.
(Address in full)

This return must be made to the Collector of Internal Revenue for the district in which the withholding agent is located, on or before March 15, 1928, and the tax must be paid on or before June 15, 1928.

.....
(Name of withholding agent)

.....
(Address in full)

CASH CHECK M. O.
Enclosed

By .....

INSTRUCTIONS

If a debtor organization makes its own return, no entries should be made on the lines provided for name and address of withholding agent. This return must be made by the debtor organization, or its duly authorized withholding agent, and must show, by months in which the income was paid and reported on Form 1012, the total amount of tax to be paid at the source on each of the following classes of payments:

1. Interest on bonds containing a tax-free covenant clause:
   (a) If paid to a citizen or resident of the United States (individual or fiduciary) not claiming exemption, a domestic or resident partnership, a nonresident alien (individual or fiduciary), a foreign partnership or a foreign corporation having no office or place of business in the United States, or if the owner of the bonds is unknown, a tax of 2 per cent shall be withheld and paid at the source; except
   (b) If paid to a citizen or resident who files with the interest coupons on or before February 1, 1928, a certificate on Form 1000A that his net income in excess of the personal exemption and other credits does not exceed $4,000, a tax of 1½ per cent shall be withheld and paid at the source.
2. Interest on bonds not containing a tax-free covenant clause:
   (a) If paid to a nonresident alien (individual or fiduciary), a foreign partnership having no office or place of business in the United States, or if the owner of the bonds is unknown, a tax of 5 per cent shall be withheld and paid at the source.
   (b) If paid to a foreign corporation having no office or place of business in the United States, a tax of 13½ per cent shall be withheld and paid at the source.

MONTH	CLASS 1(a)	CLASS 1(b)	CLASS 2(a)	CLASS 2(b)	TOTAL
JANUARY	$ 60	$	$	$	$ 60
FEBRUARY					
MARCH	400 80	11 25			412 05
Supp.	1 20	25			1 45
APRIL	23 40	2 25			25 65
MAY	4 80	-			4 80
Supp.	1 80				1 80
JUNE					
JULY					
AUGUST	60				60
SEPTEMBER	319 00	22 85			341 85
OCTOBER	1 40	6 30			23 70
NOVEMBER	9 60	45			10 05
DECEMBER					
TOTALS	$ 778 20	$ 44 55	$ -	$ -	$ 822 75
Less adjustments on account of Forms 1001B, attached hereto				$ -	
Less adjustments on account of Forms 1001C, attached hereto				-	
Total adjustments					
Amount of tax to be assessed					$ 822 75

I swear (or affirm) that the above return is a full and complete summary of the amounts of tax (heretofore reported on the monthly returns on Form 1012, which are hereby made a part of this return) required to be withheld from payments made by the above organization during the calendar year 1927.

Sworn to and subscribed before me this 16th day of March, 1928.

E. M. MERRICK
(Signature)
Notary Public, Hennepin County, Minn.
My commission expires Dec. 28th, 1929

342

A. A. Stigen
(Signature)
Assistant Auditor
(Capacity in which acting)
1100 Builders Exchange Bldg.
(Address)
Minneapolis, Minnesota.

EXHIBIT H. 303

Ex-I

Form 1012
Treasury Department
Internal Revenue

Collector will stamp here the date of filing if this return is not accompanied by remittance.

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON INTEREST DERIVED FROM BONDS AND SIMILAR OBLIGATIONS OF DOMESTIC AND RESIDENT CORPORATIONS 6% First Mortgage Bonds

For Calendar Year 1927

Do not write in this space

PAYMENT

$ _____

(Cashier's Stamp)

Minnesota and Ontario Paper Company
(Name of debtor organization)

1100 Builders Exchange Bldg., Minneapolis, Minn.
(Address in full)

This return must be made by the Collector of Internal Revenue for the district in which the withholding agent is located, on or before March 15, 1928, and the tax must be paid on or before June 15, 1928.

_____
(Name of withholding agent)

_____
(Address in full)

CASH CHECK M. O.
Received

By _____

INSTRUCTIONS

If a debtor organization makes its own return, no entries should be made on the lines provided for name and address of withholding agent. This return must be made by the debtor organization, or its duly authorized withholding agent, and must show, by months in which the income was paid and reported on Form 1012, the total amount of tax to be paid at the source on each of the following classes of payments:

1. Interest on bonds containing a tax-free covenant clause:
   (a) If paid to a citizen or resident of the United States (individual or fiduciary) not claiming exemption, a domestic or resident partnership, a nonresident alien (individual or fiduciary), a foreign partnership or a foreign corporation having no office or place of business in the United States, or if the owner of the bonds is unknown, a tax of 2 per cent shall be withheld and paid at the source; except
   (b) If paid to a citizen or resident who files with the interest coupons on or before February 1, 1928, a certificate on Form 1040A that his net income in excess of the personal exemption and other credits does not exceed $4,000, a tax of 1½ per cent shall be withheld and paid at the source.
2. Interest on bonds not containing a tax-free covenant clause:
   (a) If paid to a nonresident alien (individual or fiduciary), a foreign partnership having no office or place of business in the United States, or if the owner of the bonds is unknown, a tax of 5 per cent shall be withheld and paid at the source.
   (b) If paid to a foreign corporation having no office or place of business in the United States, a tax of 13½ per cent shall be withheld and paid at the source.

See Schedule Attached.

MONTH	CLASS 1(a)	CLASS 1(b)	CLASS 2(a)	CLASS 2(b)	TOTAL
JANUARY	$ 1 090 28	$ -	$ -	$ -	$ 1 090 28
FEBRUARY	88 08	-	-	-	88 08
MARCH	32 97	-	-	-	32 97
APRIL	3 675 86	23	-	-	3 676 09
MAY	300 81	-	-	-	300 81
JUNE	62 14	-	-	-	62 14
JULY	664 [illegible]	345 92	-	-	1 010 15
AUGUST	58 [illegible]	6 23	-	-	65 18
SEPTEMBER	170 [illegible]	3 [illegible]	-	-	174 22
OCTOBER	3 407 [illegible]	428 17	-	-	3 835 49
NOVEMBER	1 115 77	96 [illegible]	-	-	1 211 18
DECEMBER	145 [illegible]	23 [illegible]	-	-	161 38
TOTALS	$ 10 807 [illegible]	905 [illegible]	$ -	$ -	$ 11 712 92

Less adjustments on account of Forms 1001B, attached hereto _____ $ - - -

Less adjustments on account of Forms 1001C, attached hereto _____ - - -

Total adjustments _____

Amount of tax to be assessed _____ $ 11 712 92

I swear (or affirm) that the above return is a full and complete summary of the amounts of tax (heretofore reported on the monthly returns on Form 1012, which are hereby made a part of this return) required to be withheld from payments made by the above organization during the calendar year 1927.

Sworn to and subscribed before me this 14th day of March, 1928.

E. M. Merrick
Notary Public, Hennepin County, Minn.
My commission expires Dec. [illegible]

A. A. Fitzgerald
(Signature)

Assistant Auditor.
(Capacity in which acting)

343 1100 Builders Exchange Bldg.
(Address in full)

_____
(Title)

EXHIBIT I.

307

MINNESOTA & ONTARIO PAPER COMPANY.

Ex-I

Schedule Supporting Form 1013
Taxes Withheld on First Mortgage Bonds
Year 1927

		Class 1(a)	Class 1(b)	
January	- Original Return	$ 1,073.65	$	$ 1,073.65
"	- Supplementary "	16.63		16.63
		1,090.28		1,090.28
February	- Original Return	70.40		70.40
"	- Supplementary "	17.63		17.63
		88.03		88.03
March	- Original Return	32.31		32.31
"	- Supplementary "	.66		.66
		32.97		32.97
April	- Original Return	3,572.85		3,572.85
"	- Per Bureau Letter Dated 11-1/27	.37		.37
"	& Supplementary Return	99.04		99.04
"	- " "	1.80	.23	2.03
"	- " "	1.80	-	1.80
		3,675.86	.23	3,676.09
May	- Original Return	223.16		223.16
"	- Supplementary "	77.65		77.65
		300.81		300.81
June	- Return	62.14		62.14
		62.14		62.14
July	- Original Return	644.61	344.08	988.69
"	- Supplementary "	19.62	1.80	21.42
"	- " "	-	.04	.04
		664.23	345.92	1,010.15
August	- Original Return	41.58	7.56	49.14
"	- Supplementary "	14.05	-	14.05
"	- " "	1.32	.67	1.99
		56.95	8.23	65.18
September	- Original Return	170.16	3.06	173.22
		170.16	3.06	173.22
October	- Original Return	3,388.92	427.72	3,816.64
"	- Supplementary "	18.40	.45	18.85
		3,407.32	428.17	3,835.49
November	- Original Return	1,046.80	90.45	1,138.65
"	- Supplementary "	69.57	5.96	75.53
		1,114.77	96.41	1,211.18
December	- Original Return	37.60	7.88	45.48
"	- Supplementary "	106.29	15.61	121.90
		143.89	23.49	167.38
Grand Totals for Year 1927		$ 10,807.41	$ 905.51	$ 11,712.92

DELINQUENT

Exhibit J.

Form 1042
U. S. INTERNAL REVENUE

Address all communications to the Collector of Internal Revenue for the district in which the withholding agent is located, not to individuals.

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

For Calendar Year 1927

This return must be made by the withholding agent in the district in which the withholding agent is located, if an individual, and if a corporation, partnership, association, or trust, in the district in which the principal office or place of business is located.

Minnesota and Ontario Paper Company,
(Name of withholding agent)

1100 Builders Exchange Building, Minneapolis, Minnesota.
(Address in full)

Do not write in this space
PAYMENT
$.....
(Cashier's Stamp)

CASH CHECK M. O.
Received
By.....

INSTRUCTIONS

This return is required to be made by all individuals, corporations, and partnerships, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds), rents, salaries, wages, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 216 (a) of the Revenue Act of 1926) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payors of such income are required to withhold and deduct a tax therefrom at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 13½ per cent when paid to foreign corporations.

A nonresident alien individual is entitled to the personal exemption of $1,000, and, in addition, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1115 with his employer not later than February 1 of the succeeding year. By filing Form 1115 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable to compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year 1927.

Guy O. Helgesen
Commissioner

This return is prepared under Section 3176, Revised Statutes, from the best information available.

(Capacity in which acting)

Number of Claims for Credit, Form 1115, attached to this return None

Sworn to and subscribed before me this ..... day of ....., 1928.

(Signature) (Title)

RATE	AMOUNT PAID	TAX WITHHELD
1½%	$.....	$.....
3%	$.....	$.....
5%	$.....	$.....
13½%	$1496734.94	$202389.22
Total	$1496734.94	$202389.22

NAME OF INDIVIDUAL, PARTNERSHIP, OR CORPORATION TO WHOM PAID	ADDRESS IN FULL	AMOUNT OF INCOME PAID	EXEMPTIONS AND CREDITS (Attach Form 1114)	AMOUNT TAXABLE	AMOUNT OF TAX WITHHELD
Fort Francis Pulp and Paper Company, LIMITED,	Fort Francis, Ontario, Canada.	$1496734.94	None	$1496734.94	$202389.22
			282	B+P	
				202,389.22	
				50,562.31	
				61,530.25	
				144441.78	
				MMD	
				27 7/8/33 Ref	
				JUL 10 1933	Appl #1
Totals		$1496734.94	None	$1496734.94	$202389.22

Return Prepared By the Commissioner Under the Provisions of Section 3176 R. S.
Basis: G. L. M. (Account Corr.) 4/6/33
Dig.: AR Sec. D Auditor
Approved: L. K. Sunderland Date: 7/5/33

345

B-1

EXHIBIT J.-211

Corrected

DELINQUENT

Exhibit K

Form 1042
U. S. Internal Revenue

ANNUAL RETURN OF INCOME TAX TO BE PAID AT SOURCE

ON SALARIES, WAGES, RENT, ETC., PAID TO NONRESIDENT ALIEN INDIVIDUALS, FOREIGN PARTNERSHIPS AND FOREIGN CORPORATIONS NOT ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES AND HAVING NO OFFICE OR PLACE OF BUSINESS THEREIN

For Calendar Year 1926.

Do not write in this space
PAYMENT
$
(Cashier's Stamp)

This return must be made by the Collector of Internal Revenue for the district in which withholding agent is located, or, if withholding agent is located in a foreign country, then by the collector at the port where the return is required to be filed.

Minnesota and Ontario Paper Company,
(Name of withholding agent)

1100 Builders Exchange Building, Minneapolis, Minnesota.
(Address in full)

CASH CHECK M. O.
Examined
By

INSTRUCTIONS

This return is required to be made by all individuals, corporations, and partnerships, in whatever capacity acting, having the control, receipt, custody, disposal, or payment of interest (except interest on corporate bonds), rents, salaries, wages, or other fixed or determinable annual or periodical income (other than dividends of the class allowed as a credit by Section 216 (a) of the Revenue Act of 1926) of nonresident alien individuals, foreign partnerships and foreign corporations not engaged in trade or business in the United States and not having any office or place of business therein. The payors of such income are required to withhold and deduct a tax therefrom at the rate of 5 per cent when paid to nonresident alien individuals or foreign partnerships, and 13½ per cent when paid to foreign corporations.

A nonresident alien individual is entitled to the personal exemption of $1,500, and, in addition, if such alien is a resident of Canada or Mexico he may claim a credit of $400 for each dependent. Such exemption and credit for dependents can be claimed on this return in connection with salaries or wages, provided the alien files Form 1115 with his employer not later than February 1 of the succeeding year. By filing Form 1115 an alien who is a resident of Canada or Mexico is also entitled to have tax withheld from income attributable to compensation for personal services actually performed in the United States in excess of the personal exemption and credit for dependents at the rate of 1½ per cent on the first $4,000, 3 per cent on the second $4,000, and 5 per cent on the amount in excess of $8,000.

I swear (or affirm) that the following is a true and complete return of all payments of salaries, wages, interest, rents, etc., made by the above-named withholding agent to nonresident alien individuals, foreign partnerships, and foreign corporations, and of the tax withheld from such payments, during the calendar year 1926.

Rate	Amount Paid	Tax Withheld
13½%	$	$
5%	$	$
5%	$	$
13½%	$609,785.81	$82,318.56
Totals	$609,785.81	$82,318.56

This return is prepared under Section 3176, Revised Statutes, from the best information available.

Guy T. Helvering
Commissioner
(Signature)

(Capacity in which acting)

Number of Claims for Credit, Form 1115, attached to this return None

Sworn to and subscribed before me this _____ day of _____, 1926.

(Signature) (Title)

Name of Individual, Partnership, or Corporation to Whom Paid	Address of Payee	Amount of Income Paid	Exemptions and Credits (Articles 511, 512, Regs. 69)	Amount Taxable	Amount of Tax Withheld
Fort Francis Pulp & Paper Company, Limited	Fort Francis, Ontario Canada.	$609,785.81	None	$609,785.81	$82,318.56

AUDIT REVIEW DIVISION
289 Bad
NOV 10 1932
ASSESSMENT
1 $ 82,318.56
2 $ 20,539.60
3 $ 29,478.90
Total $ 132,870.86

ASSESSMENT MADE
2nd
10/6/32
$ 76.85

Return Prepared By the Commissioner Under the Provisions of Section 3176 R. S.
Basis: G. & M. (Income Corp.) 4/2/33
Div.: A.R.V. Sec.: A-7 Auditor:
Approved: Date: 11/7/33

Totals $609,785.81 None $609,785.81 $82,318.56

JUL 10 1933
0 5

Appeal #1

EXHIBIT K.313

A-1

347 Mr. Garvey: The plaintiffs now having formally rested in Law Case Number 3391, the defendant renews its motion to dismiss as heretofore filed, and the defendant, now resting in that case, does hereby renew its motion for judgment as heretofore filed.

The Court: The motions will be taken under advisement, and the respective parties will be allowed exceptions to the adverse rulings.

Mr. Larson: So that there will be no question about the state of the record, the plaintiffs, in Case Number 3391, now rest, and renew the motions as already stated in the record.

The Court granted the Government sixty days in which to file a brief, and the trustees thirty days thereafter within which to file their brief, and the Government was permitted to file requests for findings of fact and conclusions of law at the same time that it filed its brief.

Thereafter, at the same time as filing the brief, the defendant filed its requests for findings and conclusions which, omitting caption, was in words and figures as follows:

Now comes the United States, defendant in the above-entitled action, by George F. Sullivan, United States Attorney, and John E. Garvey, Special Assistant to the Attorney General, with the request to the Court to adopt as its Findings of Fact and Conclusions of Law the Findings and Conclusions, whereof a copy is attached hereto. The original, or ribbon copy, of said proposed Findings and Conclusions is also submitted herewith for the convenience of the Court.

With its request for findings and conclusions, the defendant made and filed proposed findings of fact and conclusions of law, which, omitting caption, was in words and figures as follows:

348 Defendant's Requested Findings of Fact and Conclusions of Law.

In the District Court of the United States in and for the District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer as Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiffs,
No. 3391. vs. At Law.
United States of America, Defendant.

The above-entitled action came on for trial on the 4th day of May, 1936, at Minneapolis, Minnesota before the Court,

sitting without a jury; upon the case being called for trial, the United States, in conformity with the allegations of its answer, made and filed a motion to dismiss certain causes of action purported to be stated in the plaintiffs' petition; this Court heretofore by appropriate order, and for lack of jurisdiction thereof, dismissed all causes of action purported to be stated in the plaintiffs' petition, except that for the recovery of $7,758.58 of tax, and $518.34 of interest thereon paid by the Minnesota and Ontario Paper Company to the Collector on the 23rd day of April, 1930, under the first deficiency income tax assessment made for the year 1928.

The Court having read and considered the pleadings on file herein, and having read and considered the stipulations and other evidence filed in the case, and having read and considered the briefs which have been supplied, the Court now makes findings of fact and conclusions of law as follows:

349 Findings of Fact.

I.

Minnesota and Ontario Paper Company is a corporation organized and existing under the laws of the State of Maine. It is hereinafter referred to as the Paper Company.

II.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer now are and at all times since September 29, 1934, have been, pursuant to an order of this Court that day made and entered under Section 77B of the Bankruptcy Act, the duly appointed, qualified, and acting trustees of the estate of the Paper Company, debtor. Between July 11, 1934, and said September 29, 1934, C. T. Jaffray and R. H. M. Robinson, pursuant to an order of this Court made and entered under said Act on July 11, 1934, were the duly appointed, qualified, and acting temporary trustees of the estate of the Paper Company, debtor. From November 30, 1931, until their appointment as such temporary trustees on July 11, 1934, Jaffray and Robinson were the duly appointed, qualified, and acting receivers of the Paper Company.

III.

From 1917 to 1920, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with the following corporations: International Lumber Company, Rainy River Improvement Company, Min-

nesota, Dakota and Western Railway Company, Falls Lumber and Coal Company, Watrous Island Boom Company, and International Insulation Company. From 1921 to 1925, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with all said named corporations except International Insulation Company. From 1926 to 1928, inclusive, the Paper Company owned shares of the capital stock of and for income-tax purposes was affiliated with all said named corporations together with Minnesota Forest Products Company, a corporation. The corporations affiliated with the Paper Company are sometimes herein referred to as "affiliates".

350 During each of said three periods the annual earnings or net income of the Paper Company and its affiliates were consolidated for income-tax purposes. All taxes paid on such consolidated earnings or net income have been paid by the Paper Company.

IV.

The income taxes paid by the Paper Company to the United States for the year 1928, of which recovery is sought in this action, were paid to one Levi M. Willcuts as the duly appointed, qualified, and acting Collector of Internal Revenue for the District of Minnesota. Willcuts was such Collector from June 1, 1921, to July 31, 1933, inclusive. Since the latter date he has not been and is not now in office as Collector of Internal Revenue.

V.

a. In February, 1921, and March, 1924, the Commissioner assessed an aggregate amount of $759,838.91 as additional taxes upon the 1917 consolidated income of the Paper Company and its affiliates. In March, 1924, the Commissioner assessed $884,665.66 as additional taxes upon the 1918 consolidated income of the Paper Company and its affiliates. Claims for abatement of $498,111.21 of the 1917 assessment were rejected on February 4, 1925. A claim for abatement of the 1918 assessment was rejected January 23, 1925. On January 23, 1925, the Commissioner notified the Paper Company and its affiliates of his determination of deficiencies of $613,248.82 and $1,403,435.47 in taxes upon the consolidated income of the Paper Company and its affiliates for 1919 and 1920 respectively. On February 21, 1925, the Paper Company and its affiliates filed petitions with the Board for redetermination of the said additional taxes assessed for 1917 and 1918. On March 19, 1925, the Paper Company and its affiliates filed petitions with the Board

for redetermination of the deficiencies determined for 1919 and 1920.

351 b. While said proceedings were pending before the Board, the Paper Company and its affiliates held conferences with the Commissioner and other representatives of the Treasury Department for the purpose of ascertaining and agreeing upon the amount of tax owed for each of said years 1917 to 1920, inclusive. As the result of said conferences the Paper Company and the Commissioner entered into a written stipulation dated February 25, 1926. Said stipulation was filed with the Board February 26, 1926.

c. By letter dated February 25, 1926, the Commissioner advised the Paper Company as follows:

Confirming the agreement made with the Commissioner of Internal Revenue on February 24, 1926, you are advised that the amount of the penalty to be assessed against you as the result of the negligent understatement of your tax liability for the taxable years 1917, 1918, 1919, and 1920 will be compromised by accepting a sum equal to 6 per cent per annum on the amount of the deficiences determined and assessed in accordance with the stipulation this date entered into between the taxpayer and the representative of this office, from the date the deficiencies became due and payable to the date of payment.

d. On February 26, 1926, the following further written stipulation was signed and filed with the Board:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by its attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer", by its counsel, that the taxpayer's deficiency in tax for the taxable years 1917, 1918, 1919, and 1920 shall be determined by the Board of Tax Appeals in accordance with the agreement entered into between the taxpayer and the Commissioner on February 25, 1926, a copy of which is hereto attached, marked "Exhibit A", and made a part of this stipulation.

e. On February 26, 1926, the Board entered the following order in respect of said proceedings then pending before it:

352 This appeal coming on to be heard on February 26, 1926, the taxpayer being represented by Ralph M. Shaw, Esq., and the Commissioner being represented by E. C. Lake, Esq., and it appearing that the parties have entered into a

certain stipulation which was filed on this date, and it appearing that the parties have agreed to compute the tax in accordance with the stipulation aforesaid; Now, therefore, on agreement of counsel for both parties, it is

Ordered, That the tax shall be computed in accordance with the stipulation filed this date and referred to hereinabove. Final determination of the deficiency will be made under rule 50 of the Board's Rules of Practice on consent of the parties or on 10 days' notice by either party to the adverse party.

f. On March 6, 1926, the following further stipulation was filed with the Board in said proceedings:

It is hereby stipulated and agreed by and between the Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, and by the Minnesota & Ontario Paper Co. and its said affiliated corporations, hereinafter referred to as the "taxpayer", by its counsel, that the amount of the deficiency due from the taxpayer or overassessment in the above-entitled appeals for each of the taxable years 1917, 1918, 1919 and 1920 is as follows:

	Tax	Penalty
1917, overassessment	$270,305.51	$227,633.03
1918, overassessment	532,722.18	139,897.55
1919, deficiency	491,360.53	165,834.19
1920, deficiency	920,772.85	255,514.47

The above overassessments for the years 1917 and 1918 arose by reason of the Commissioner's assessing against the Paper Company additional taxes of $759,838.91 for the year 1917 and $884,665.66 for the year 1918. The additional taxes agreed upon as due by the Paper Company for the years 1917 and 1918 were in the respective amounts of $489,533.40 and $351,943.48, which amounts were respectively $270,305.51 and $532,722.18 less than the respective amounts theretofore assessed for said years as set forth in subparagraph (a) above. There was no assessment of the amounts designated "Penalty" prior to March 8, 1926.

353 g. Pursuant to the stipulations filed as noted above, the Board on March 6, 1926, entered three orders determining the amount owing for each year involved. The amount owing for 1917 was covered in one order; the amount owing for 1918 was covered in another order; and the amount owing for each of the years 1919 and 1920 was covered in the third order. The pertinent provisions of said orders are respectively as follows:

Ordered that the amount of tax deficiency and penalty due from the taxpayer be and the same is hereby redetermined for the year 1917 to be $489,533.40 tax, and $227,633.03 penalty, and that of the tax heretofore assessed there shall be abated the sum of $270,305.51 and the amount of the penalty of $227,633.03 shall be assessed and paid.

Ordered that the amount of tax deficiency and penalty due from the taxpayer be and the same is hereby redetermined for the year 1918 to be $351,943.48 tax deficiency, and $139,897.55 penalty, and that of the tax heretofore assessed there shall be abated the sum of $532,722.18 and the amount of the penalty of $139,897.55 shall be assessed and paid.

Ordered that the amount of tax deficiency due from the taxpayer in and for the said years be and the same is hereby redetermined for the year 1919 to be $491,360.53 and for the year 1920 to be $920,772.85 and in addition thereto penalty in the amounts respectively of $165,834.17 and $255,514.46, which said tax deficiencies and penalties shall be assessed and paid.

h. Thereafter on March 8, 1926, the Commissioner, in accordance with the Board's orders, referred to above, assessed on his March, 1926, assessment list the amounts of the deficiencies for 1919 and 1920 and the amounts designated as "penalties" for 1917, 1918, 1919, and 1920, and issued certificates of overassessment of the amounts to be abated for the years 1917 and 1918. On March 12, 1926, the Collector issued notices and made demand for each of the years as follows:

Year	Tax	Amounts Called "Penalty" in Board's Orders	Interest	Total
1917	$ 489,533.40	$227,633.03		$ 717,166.43
1918	351,943.48	139,897.55		491,841.03
1919	491,360.53	165,834.17	807.71	658,022.41
1920	920,772.85	255,514.46	1,513.59	1,177,800.90
Total	$2,253,610.26	$788,879.21	$2,321.30	$3,044,810.77

354 The total of the amounts designated as "Penalty" and of the interest is $791,200.51.

On March 22, 1926, the Paper Company paid to the Collector $3,044,810.77, the sum of the foregoing demands.

i. On April 18, 1928, a suit was instituted in the Court of Claims against the United States for the recovery of income, war-profits, and excess-profits taxes for the years

1917 to 1920, inclusive. The decision of the Court of Claims is reported in 59 Fed. (2d) 242. Reference to said decision is hereby made.

VI.

a. On May 11, 1929, the Paper Company filed with the Collector its consolidated income tax return for the year 1928 reporting a consolidated net loss and no tax liability. The Commissioner, upon an audit of said return, determined a deficiency in tax for the said year 1928 in the sum of $7,758.58 tax and $518.34 interest thereon, and on April 26, 1930, said amount was by the Commissioner assessed against the Paper Company, and the same was paid to the Collector as set out in subparagraph (b) hereof. On the October 31, 1931 Assessment List for the District of Minnesota, the Commissioner, pursuant to Section 274 (a) of the Revenue Act of 1928, assessed an additional tax for 1928 against the Paper Company in the amount of $42,166.52 and interest thereon of $6,646.71, which amounts, together with the previous assessment, made April 26, 1930, of $7,758.58 in taxes and $518.34 in interest thereon (which last amounts had been paid to the Collector prior to October 31, 1931, as hereinafter set out in subparagraph (b) hereof), made a total of $57,090.15. The Commissioner made a further audit of such return for the year 1928 and as a result thereof issued a certificate of overassessment bearing the number 2223612. By said certificate $34,543.10 of the total amount assessed as aforesaid on October 31, 1931, was abated, leaving a balance on account of taxes and interest assessed for the year 1928 but outstanding and unpaid as follows: income taxes,
$12,774.52; interest thereon to October 31, 1931,
355 $1,495.61; total, $14,270.13.

b. On April 29, 1930, pursuant to a demand of the Collector, the Paper Company paid to him $7,758.58, together with interest thereon of $518.34, the additional tax and interest for the year 1928, assessed by the Commissioner on the April 26, 1930 Assessment List for the District of Minnesota. On February 9, 1932, the receivers filed a claim for refund of such additional tax and interest so paid. The grounds stated in the said claim for refund are as follows:

Reference is herewith made to a "Statement of Objections" dated January 27, 1932, filed by C. T. Jaffray and R. H. M. Robinson, Receivers for Minnesota and Ontario Paper Company, against the additional assessment of corporation income taxes for years, 1926, 1927 and 1928, and on basis of said statement, the taxpayer is entitled to a re-

fund for the year 1928 amounting to $7,758.58 plus interest thereon as provided by law.

All of the facts recited in said statement are incorporated herein by reference with the same force and effect as if fully rewritten herein.

The "Statement of Objections" dated January 27, 1932, to which said claim for refund makes reference, alleged as error the disallowance by the Commissioner of the deduction for 1926 of $790,355.20 of the amount of $791,200.51 referred to in Section V (h) above. Said claim for refund was rejected by the Commissioner and the receivers of the Paper Company notified thereof by letter dated July 13, 1933.

VII.

In making his final determination of income tax liability for the said year 1926, the Commissioner did not allow as a deduction the item of $788,879.21 designated in the Board's orders as penalties, and did not allow as a deduction $1,475.99 of the amount paid by the Paper Company as interest, all as set out in paragraph V (h) hereof. In arriving at the total tax liability of $33,565.47 for the year 1926, the Commissioner determined a consolidated net income of $248,633.10. In arriving at the total tax liability of $38,965.14 for the year 1927, the Commissioner determined a consolidated net income of $288,630.69. In arriving at the total tax liability of $20,533.10 for the year 1928, the
356 Commissioner determined a consolidated net income of $187,094.55. The foregoing consolidated net incomes for the years 1926, 1927, and 1928 were arrived at as to each company of the affiliated group as follows:

	Year 1926	
Net Income:		
Minnesota and Ontario Paper Co.		$462,609.08
Falls Lumber and Coal Company		41,400.37
		$504,009.45
Less Net Losses:		
International Lumber Company	$163,108.72	
Minnesota, Dakota & Western Ry. Co.	16,874.38	
Rainy River Improvement Company	19,860.81	
Minnesota Forest Products Company	55,532.44	255,376.35
Consolidated Net Income for 1926		$248,633.10

Year 1927

Net Income:		
Minnesota and Ontario Paper Co.		$678,568.62
Falls Lumber Company		32,490.43
		$711,059.05
Less Net Losses:		
International Lumber Company	$312,502.11	
Minnesota, Dakota & Western Ry. Co.	36,222.37	
Rainy River Improvement Co.	20,519.49	
Minnesota Forest Products Co.	53,184.39	422,428.36
Consolidated Net Income for 1927		$288,630.69

Year 1928

Net Income:		
Minnesota and Ontario Paper Co.		$314,796.00
Minnesota, Dakota & Western Ry. Co.		46,828.43
Falls Lumber and Coal Company		21,967.71
		$385,592.14
Less Net Losses:		
International Lumber Company	$130,016.31	
Rainy River Improvement Co.	14,719.76	
Minnesota Forest Products Co.	53,761.52	198,497.59
Consolidated Net Income for 1928		$187,094.55

VIII.

On June 12, 1933, pursuant to authorization duly given, the Paper Company and its affiliates executed, and on July 7, 1933, the Commissioner executed, with the approval of the Secretary of the Treasury on the same day given, an agreement entered into under and in pursuance of Section 606 of the Revenue Act of 1928. The pertinent provisions of said closing agreement are as follows:

357 Whereas, there has been a determination of the tax liability of said taxpayers in respect of income tax imposed by the Revenue Acts of 1921, 1924, 1926, and 1928, for each taxable period stated above falling under the provisions of those Acts in the sum of

$ 17,500.00 for the calendar year 1922,
136,925.19 for the calendar year 1923,
47,022.71 for the calendar year 1924,
1,565.77 for the calendar year 1925,
33,565.47 for the calendar year 1926,
38,965.14 for the calendar year 1927, and
20,533.10 for the calendar year 1928,

exclusive of any penalty or interest applicable thereto as provided by law:

Now, this agreement witnesseth, that said taxpayers and said Commissioner of Internal Revenue hereby mutually agree that the principal amount of such liability so determined shall be final and conclusive if this agreement is approved by the Secretary of the Treasury, or the Under Secretary, within one year from the date this agreement is signed by said taxpayers.

Reserving, however, to the taxpayers the right to contest the disallowance of the deduction claimed for the year 1926 in the amount of $790,455.20, which amount was paid, on March 22, 1926, to the United States Government in connection with the payment of additional Federal income, war-profits and excess-profits taxes for the calendar years 1917 to 1920, inclusive, and which amount the taxpayers contend was deductible as interest on deficiencies in taxes, and/or was deductible as a penalty, which contentions the Government denies, and reserving to the taxpayers the right to any benefit from the reduction in Federal income taxes, for the years 1926, 1927 and 1928, that will result in the event of a final conclusion of the issues favorable to the taxpayers.

358 Conclusions of Law.

I.

That the agreement, made under the provisions of Section 606 of the Revenue Act of 1928, established $20,533.10 of tax as the Paper Company's income tax liability for the year 1928; that the tax liability so established is conclusive, except in so far as same may be reduced as the result of allowing the deduction claimed for the year 1926; that if the deduction so claimed for the year 1926 is allowed in full, nevertheless, at the time the Collector collected the $7,758.58 of tax and $518.34 of interest thereon as set forth in paragraph VI (b) hereof, the Paper Company actually owed in excess of that amount as taxes for the said year 1928.

II.

That the plaintiffs have wholly failed to prove what the correct tax liability of the Paper Company would have been for the year 1928 in the event of the allowance of the deduction claimed for the year 1926.

III.

That the plaintiffs have wholly failed to prove that the collection made by the Collector on the 23rd day of April, 1930, of $7,758.58 of tax and $518.34 of interest thereon was

in excess of the Paper Company's tax liability for the year 1928, but, on the other hand, the proof shows that the amount so collected by the Collector was a lesser amount than that actually owing by the Paper Company on said date.

IV.

That the plaintiffs have wholly failed to prove that the allowance of the claimed deduction for the year 1926 would have reduced the tax liability for the year 1928 as such tax liability was determined in the 606 closing agreement hereinbefore referred to.

359

V.

That the deduction claimed by the taxpayer and disallowed by the Commissioner for the year 1926, and which is the sole basis of recovery in this suit, was the sum assessed against and collected from the taxpayer as a penalty imposed on the Minnesota and Ontario Paper Company on account of understatement of its income for the years 1917 to 1920, inclusive; that this sum of money, being a penalty payment, was not allowable as a deduction from income under the applicable provisions of the revenue laws, and the Commissioner of Internal Revenue properly disallowed the said sum as a deduction from the income of the Minnesota and Ontario Paper Company for the year 1926; the deduction so claimed for the year 1926 having been properly disallowed, the income tax liability, for the year 1928, as agreed to in the 606 closing agreement referred to above, is final and conclusive.

VI.

On account of failure of proof, this action should be dismissed as against the plaintiffs, and the United States should have judgment for its costs and disbursements herein.

Let judgment in accordance with the foregoing findings of fact and conclusions of law be submitted within .... days of the entry of these findings and conclusions.

....,
United States District Judge.

July, ..., 1936.

---

360 The Court refused to grant the motion to dismiss filed by defendant, to which action of the court defendant was duly allowed an exception.

The Court refused to sustain the motion for judgment filed by defendant, to which action of the Court defendant was duly allowed an exception.

The Court refused to grant defendant's proposed findings of fact and conclusions of law, to which action of the Court defendant was duly allowed an exception.

Thereafter plaintiffs also made a motion for special findings of fact and conclusions of law. Among the conclusions of law requested by the plaintiffs were the two following conclusions:

VIII.

The amount of $791,200.51, and the whole thereof, paid to the Collector on March 22, 1926, as part of the total payment of $3,044,810.77 that day made to the Collector was and is interest and was not and is not penalty. The Paper Company was and is entitled under Section 234 (a) (2) of the Revenue Act of 1926 to have the same deducted from gross income for the purpose of determining taxable net income for the year 1926. Disallowance by the Commissioner of the deduction of $790,355.20 of said amount of $791,200.51 was and is without authority and contrary to law.

XVI.

The report on Form 1042 for the year 1921, filed with the Collector not later than March 15, 1922, was and is in substantial compliance with the requirements of the law relating to income-tax and withholding-tax returns, was made in good faith and not fraudulently, was and is a good and sufficient return, and operated to begin the running of the statute of limitations against the assessment or collection of withholding taxes for said year 1921. The assessment of additional withholding taxes for the year 1921 made on July 10, 1933, was not made within the period prescribed therefor by law, and was and is barred by the statute of limitations.

The Court refused to grant plaintiffs' requested conclusions of law set out above, to which action of the Court plaintiffs were duly allowed an exception.

By order dated and filed February 25, 1937, the Court overruled and denied each and all objections, hereinbefore set out, made and entered by the plaintiffs to the reception in evidence of certain portions of the written stipulation of facts herein. Exceptions to said rulings were duly allowed.

On the 9th day of April, 1937, the Court entered judgment in favor of the plaintiffs and against the defendant, to which action of the Court defendant was duly allowed an exception.

The term and time within which to file bill of exceptions was extended to the 9th day of November, 1937, by Rule 25 of the Court extending the term and the time within which to file bill of exceptions.

---

361 (Stipulation of Counsel Approving Bill of Exceptions.)

It is hereby stipulated by and between the parties hereto that the above and foregoing, which is tendered by the parties in this case as the Bill of Exceptions in the case, contains a true and correct statement of the evidence and of all the evidence introduced in said case, and of all of the proceedings in the trial and disposition of said case, and the exceptions had and taken in said proceedings.

It is further agreed that this Bill of Exceptions may be approved, allowed, and settled as the Bill of Exceptions of this cause.

Dated this 10th day of September, 1937.

VICTOR E. ANDERSON,
LINUS J. HAMMOND,
J. E. GARVEY,
Attorneys for the Defendant.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for the Plaintiffs.

(Approval of Bill of Exceptions by District Judge.)

On this 10th day of September, 1937, and within the time allowed by (order or rule of court as the case may be), the defendant in this cause tendered the foregoing Bill of Exceptions herein, with stipulation of counsel attached, agreeing that the same might be approved, allowed, and settled as the Bill of Exceptions in this cause.

It appears to the Court that in said Bill is contained a full and correct statement of the evidence and of all of the evidence introduced in said cause, and of all of the proceedings had and taken in the trial and disposition thereof.

Now, Therefore, the Court having duly considered and examined said Bill of Exceptions, it being found that the Excep-

tions therein are truly alleged, the same is by the Court hereby allowed and settled and approved.

362 Given under my hand the day here last above written.

GUNNAR H. NORDBYE,
District Judge.

(Endorsed): Filed September 10, 1937. Margaret L. Mullane, Clerk, By Chell M. Smith, Deputy.

---

363 Notice of Appeal.

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiff,
No. 3391. vs. Law.
United States of America, Defendant.

To: Cobb, Hoke, Benson, Krause & Faegre, Attorneys for Plaintiff, 1260 Northwestern Bank Building, Minneapolis, Minnesota.

You Will Please Take Notice, That the above-named defendant, United States of America, considering itself aggrieved by the judgment of the Court made and entered on the 9th day of April, 1937, does hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from said judgment.

This appeal is taken upon questions of fact and of law and is based upon the records, files, assignments of error and other papers filed herein.

Dated at Saint Paul, Minnesota, this 6th day of July, A. D. 1937.

GEORGE F. SULLIVAN,
United States Attorney and
Attorney for Defendant.

---

364 Return On Service of Writ.

United States of America,
District of Minnesota.—ss.:

I hereby certify and return that I served the annexed Notice of Appeal and Assignment of Errors on the therein-named Cobb, Hoke, Benson Krause & Faegre, attorneys for

plaintiff, 1260 Northwestern Bank Building, Minneapolis, Minnesota, by handing to and leaving a true and correct copy thereof with Hayner N. Larson, a member of above named firm of attorneys personally at Minneapolis in said District on the 7th day of July, A. D. 1937.

JOHN J. FARRELL,
U. S. Marshall,
By J. H. Littell, Deputy.

(Endorsed): Filed July 9, 1937. Margaret L. Mullane, Clerk, By Thomas H. Howard, Chief Deputy.

365 **Assignment of Errors.**

Comes now the defendant, the United States of America, by George F. Sullivan, United States Attorney for the District of Minnesota, its attorney, who by direction and authority of the Attorney General of the United States is about to file a petition for appeal from a decision or judgment of this Court rendered and entered on the 9th day of April, 1937, in this cause; and in connection with its petition for appeal hereby submits to the Court the following assignment of errors;

(1) The District Court erred in not sustaining defendant's motion filed May 4, 1936, to dismiss all causes of action purported to be stated in plaintiffs' petition, with the exception of the following:

(a) The cause of action for the recovery of $7,758.58 of tax, and $518.34 of interest paid thereon, by the Minnesota & Ontario Paper Company on April 23, 1930 under the first deficiency assessment made for the year 1928.

(2) The District Court erred in overruling defendant's objection to the admission of any evidence in the case,
366 said objection being on the ground that the Court does not have jurisdiction of any purported cause of action set out in the petition and on the further ground that the petition does not state facts sufficient to constitute a cause of action.

(3) The District Court erred in not sustaining the defendant's motion for judgment made and filed as of May 4, 1936, and in not entering judgment for the defendant.

(4) The District Court erred in not sustaining defendant's motion to dismiss made at the time that the plaintiffs rested

in the case; the said motion being a renewal of the motion to dismiss made and filed at the time of the commencement of the trial.

(5) The District Court erred in making and entering as finding of facts in the case all of the court's finding of facts numbered XV with the exception of sub-divisions M and N thereof, in that the court did not have jurisdiction to inquire into those matters.

(6) The District Court erred in failing to adopt and enter the conclusion of law requested by the defendant as follows:

(a) On account of failure of proof this action should be dismissed as against the plaintiffs and the United States should have judgment for its costs and disbursements herein.

(7) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(1) This proceeding is a proceeding brought for the recovery of overpayments of internal-revenue taxes for each of the years 1922 to 1925, inclusive, and 1928, together with interest on such overpayments from the respective dates of payment thereof.

367 (8) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(2) This Court has jurisdiction of the proceeding and of the whole thereof.

(9) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(3) Claims for refund of such overpayments were filed in the manner and within the time therefor prescribed by the statutes relating thereto.

(10) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(5) The claims for refund for the years 1922 to 1925, inclusive, were disallowed and rejected on August 31, 1933. The claim for refund for the year 1928 was disallowed and rejected July 13, 1933.

(11) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(6) This proceeding was commenced within the period permitted by law for that purpose.

(12) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(7) The grounds on which recovery of overpayments is sought in this proceeding for each of the years 1922 to 1925, inclusive, and 1928 were specified as grounds for refund in said claims for refund filed in respect of each of said years.

368 (13) The District Court erred in adopting and entering as a conclusion of law, the following, in that it is contrary to the law and the evidence:

(8) The amount of $791,200.51 paid to the Collector on March 22, 1926, as part of the total payment of $3,044,810.77 that day made to the Collector was and is at least in part interest, and if any portion thereof was penalty, such portion does not exceed the sum of $112,680.51. The Paper Company was and is entitled under Section 234 (a) (1) and (2) of the Revenue Act of 1926 to have said amount of $791,200.51 deducted from gross income for the purpose of determining taxable net income for the year 1926. Disallowance by the Commissioner of the deduction of $790,355.20 of said amount of $791,200.51 was and is without authority and contrary to law.

(14) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(9) The Paper Company and its affiliates were and are entitled to have their consolidated taxable net income for the year 1927 reduced by reason of any net loss sustained in the year 1926, all in accordance with the statutes in such case made and provided.

(15) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(10) The Paper Company and its affiliates were and are entitled to have their consolidated taxable net income for the year 1928 reduced by reason of any net loss sus-
369 tained in the year 1926 which was not absorbed by the consolidated taxable net income in the year 1927 as a

result of the deduction of said amount of $790,355.20 from gross income for the purpose of determining taxable net income for the year 1926, all in accordance with the statutes in such case made and provided.

(16) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(11) (a) The Paper Company and its affiliates sustained a consolidated net loss for the year 1926 in the amount of $541,722.10, which amount is apportionable according to law as follows:

Paper Company	$304,476.89
International Lumber Company	151,528.37
Minnesota, Dakota & Western Railway Company	15,676.35
Rainy River Improvement Company	18,450.73
Minnesota Forest Products Co.	51,589.76
Total	$541,722.10

(b) The Paper Company and its affiliates realized a consolidated net income for the year 1927 in the amount of $288,630.69, which amount is apportionable according to law as follows:

Paper Company	$275,442.33
Falls Lumber & Coal Company	13,188.36
	$288,630.69

After carrying forward the net losses sustained in respect of the year 1926 in the manner required by law, the taxable net income realized for the year 1927 by the Paper Company and its affiliates is the amount of $13,188.36, which amount was realized by Falls Lumber and Coal Company.

370 (c) The Paper Company and its affiliates realized a consolidated net income for the year 1928 in the amount of $187,094.55, which amount is apportionable according to law as follows:

Paper Company	$152,743.30
Minnesota, Dakota & Western Railway Company	23,692.22
Falls Lumber & Coal Company	10,659.03
Total	$187,094.55

After carrying forward, in the manner required by law, the balance of the net losses sustained in respect of the year 1926 and not absorbed by taxable net income realized in the year 1927, the taxable net income realized for the year 1928 by the Paper Company and its affiliates is the amount of $142,383.64, which amount was realized by the Paper Company and its affiliates as follows:

Paper Company	$123,708.74
Minnesota, Dakota & Western Railway Company	8,015.87
Falls Lumber & Coal Company	10,659.03
	$142,383.64

(d) No part of the assessment of $53,106.00 made by the Commissioner on October 31, 1931, in respect of the year 1926 was lawfully due or owing.

(e) Of the assessment of $60,894.56 made by the Commissioner on October 31, 1931, in respect of the year 1927, no part thereof was lawfully due or owing except the amount of $1,510.43 plus interest thereon from March 15, 1928, to October 31, 1931. Said amount of $1,510.43 is calculated as follows:

371

Net income of Paper Company		$275,442.33
Net loss of Paper Company for 1926	$304,476.89	
Amount of said net loss allowable in 1927		275,442.33
Taxable net income of Paper Company		$ 0.00
Net income of Falls Lumber and Coal Company		13,188.36
Consolidated taxable net income		$ 13,188.36
Less exemption granted by Section 236 (b) of the Revenue Act of 1926		2,000.00
Consolidated taxable net income subject to tax		$ 11,188.36
Tax thereon at 13½%		1,510.43
Tax paid for 1927		0.00
Tax owing for 1927		$ 1,510.43

Of the assessment of $48,813.23 made by the Commissioner on October 31, 1931, in respect of the year 1928, no part thereof was lawfully due or owing except the amount of $9,327.85 plus interest thereon from March 15, 1929, to October 31, 1931. Said amount of $9,327.46 is calculated as follows:

Net income of Paper Company		$152,743.30
Less net loss of Paper Company for 1926 not absorbed in 1927		29,034.56
Taxable net income of Paper Company		$123,708.74
Net income of Minnesota, Dakota & Western Ry. Co.	$23,692.22	
Less net loss of said company for 1926 not absorbed in 1927	15,676.35	
Taxable net income of said company		8,015.87
Taxable net income of Falls Lumber & Coal Company		10,659.03
Consolidated taxable net income		$142,383.64
Tax thereon at 12%		17,086.04
Less tax paid		7,758.58
Tax owing for 1928		$ 9,327.46

372 (17) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(12) To the extent that the overpayments for the years 1922 to 1925, inclusive, and accumulated interest thereon were applied by the Commissioner as credits against the deficiency claimed by the Commissioner to be owing and unpaid for the year 1926, and to the extent that such overpayments and accumulated interest thereon were applied by the Commissioner as credits against the deficiences claimed by the Commissioner to be owing and unpaid for the years 1927 and 1928 in excess of the amounts lawfully due and owing for said years, as hereinbefore set forth, such applications and such credits were and are wholly wrongful and contrary to law, and such credits were and are void and of no effect.

(18) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and the evidence:

(13) The $164,525.98 accrued for the year 1921 in favor of the Fort Frances Company as interest owing by the Paper Company on open account by reason of newsprint paper purchased from the former by the latter was not and is not income derived from a source within the United States.

(19) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and to the evidence:

(14) No part of said amount of $164,525.98 was paid to the Fort Frances Company by the Paper Company until in the year 1927, and even if said amount constituted income derived from sources within the United States, there
373 was no obligation on the Paper Company in 1921 or at any time prior to such payment to deduct or withhold any portion of said amount or to report and pay the same to the Collector or the United States as a withholding tax.

(20) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and to the evidence:

(15) During the year 1921, the Paper Company, the Power Company, and the Fort Frances Company constituted and were engaged in related trades and businesses owned or controlled directly by the same interests within the meaning of Section 240 (d) of the Revenue Act of 1921.

(21) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and to the evidence:

(16) To the extent that accumulated interest on the overpayments for the years 1922 to 1925, inclusive, was applied by the Commissioner as credits against the deficiency of $31,121.89 in withholding taxes claimed by the Commissioner to be owing and unpaid for the year 1921, such application and such credits were and are wholly wrongful and contrary to law, and such credits were and are void and of no effect.

(22) The District Court erred in adopting and entering as a conclusion of law the following, in that it is contrary to the law and to the evidence:

(17) The plaintiffs are entitled to judgment for the recovery and refund of the following amounts:

(a) $15,909.39 paid on June 15, 1923, together with interest on said amount to October 31, 1931 (less, however, the sum of $1,839.15, being the total of the amount of $1,510.43 lawfully due and owing as additional tax for the year 1927 and of the amount of $328.72 interest thereon from March 15, 1928, to October 31, 1931), and together with interest on $14,070.24 (being the difference between said amounts
374 of $15,909.39 and $1,839.15) from and after October 31, 1931;

(b) $16,704.70 paid on September 15, 1923, together with interest on said amount to October 31, 1931 (less, however, the sum of $10,797.75, being the total of the amount of $9,327.46 lawfully due and owing as additional tax for the year 1928 and of the amount of $1,470.29 interest thereon from March 15, 1929, to October 31, 1931), and together with interest on $5,906.95 (being the difference between said amounts of $16,704.70 and $10,797.75) from and after October 31, 1931;

(c) $16,704.68 paid on December 15, 1923, together with interest on said amount from and after said date;

(d) $29,427.69 of the amount of $41,588.22 paid on December 14, 1924, together with interest on said $29,427.69 to July 10, 1933 (less, however, the sum of $22,241.52, being the amount lawfully due and owing as withholding taxes for the years 1930 and 1931 credited by the Commissioner on July 10, 1933), and together with interest on $7,186.17 (being the difference between said amounts of $29,427.69 and $22,241.52) from and after July 10, 1933;

(e) $6,172.50 of the amount of $17,731.74 paid on September 14, 1925, together with interest on said $6,172.50 from and after said date.

(f) $17,731.73 paid on December 14, 1925, together with interest on said amount from and after said date;

(g) $7,800.00 of the amount of $9,365.77 of the amount of $10,000 paid on March 13, 1926, together with interest on said $7,800.00 from and after said date.

Interest on said amounts is to be computed in accordance with the statutes in such cases made and provided, particularly Section 614 (a) (1) of the Revenue Act of 1928 and Section 177 (b) of the Judicial Code as amended by Section 615 (a) of the Revenue Act of 1928. In addition the plaintiffs are entitled to recover their costs and disbursements herein.

375 (23) The District Court erred in entering judgment in favor of the plaintiffs and against the United States in that the findings of fact are not sufficient to support the said judgment.

(24) The District Court erred in refusing to grant each and every part of defendant's requests for special findings of fact and conclusions of law.

Wherefore, defendant prays that the judgment heretofore rendered by the District Court herein be reversed and that the said cause be remanded to the District Court with instructions to enter judgment for the defendant, dismissing plaintiffs' petition.

GEORGE F. SULLIVAN,
United States Attorney.

LINUS J. HAMMOND,
Assistant United States Attorney,
Attorneys for Defendant.

(Endorsed): Service of the within Notice of Appeal and Assignment of Errors is admitted this 7th day of July, 1937.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiff.

---

376 Order Allowing Appeal.

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiff,
No. 3391. vs. Law.
United States of America, Defendant.

The above-named defendant, United States of America, having duly presented its petition for appeal and having duly served and filed its Notice of Appeal and Assignments of Error and no bond on appeal being required of defendant under Section 1001 of the Revised Statutes of the United States, the Court being satisfied that this appeal is taken by direction of the Attorney General of the United States as appears from a radiogram from the Attorney General, dated July 1, 1937, copy of which is attached to the Peti-

tion for Appeal, the prayer of said defendant United States of America is hereby granted and accordingly, it is

Ordered, That the appeal of said defendant United States of America be and the same is hereby allowed.

Dated at Minneapolis, Minnesota, this 9th day of July, A. D. 1937.

GUNNAR H. NORDBYE,
Judge of the United States District Court.

---

377 Petition for Appeal.

The above named defendant, the United States of America, considering itself aggrieved by the judgment entered in the above-entitled cause on the 9th day of April, 1937, and desiring to appeal from said judgment in said cause to the United States Circuit Court of Appeals for the Eighth Circuit, presents herewith its Notice of Appeal and Assignments of Error, no bond on appeal being required of defendant under Section 1001 of the Revised Statutes of the United States, this appeal being taken by the direction of the Attorney General of the United States as appears from the radiogram from the Attorney General dated July 1, 1937, copy of which is attached hereto and defendant prays for an order of this court allowing said appeal and for a citation directed to the above-named plaintiffs C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, requiring them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit at the city of Saint Louis, Missouri, within forty days from and after the date of said citation pursuant to said appeal. Dated at Saint Paul, Minnesota, this 6th day of July, A. D. 1937.

UNITED STATES OF AMERICA,
By George F. Sullivan,
United States Attorney and Attorney for Defendant.

---

378 Signal Corps, United States Army

47 WVU Z 37 JUS

Washington DC 322P Jul 1 1937

George F Sullivan
U S Atty St Paul Minn

Inre Jaffray and Robinson Trustees Law Number Three Three Nine One Refund Suit Time in Which to Appeal Ex-

pires July Nine Stop Protect Interests of Government by Perfecting Appeal Stop Draft of Assignment of Errors Mailed Today

JAS W MORRIS.

527P

(Endorsed): Filed July 9, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

379 Citation on Appeal.

United States District Court, District of Minnesota, Fourth Division.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, Plaintiff,
No. 3391. vs. Law.
United States of America, Defendant.

The United States of America to the above named plaintiffs, C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, and to their attorneys, Cobb, Hoke, Benson, Krause & Faegre, 1260 Northwestern Bank Building, Minneapolis, Minnesota.

You Are Hereby Cited And Admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit in the city of Saint Louis, in the state of Missouri, forty days from and after the date of this citation, pursuant to an appeal taken and filed in the office of the Clerk of the United States District Court for the District of Minnesota, notice of said appeal having been served upon you in the above-entitled cause wherein the United States of America above named is the appellant and you are the appellee, to show cause, if any there be, why the judgment rendered against said appellant in said cause should not be reversed and why speedy justice should not be done to said appellant in that behalf.

Dated at Minneapolis, Minnesota, this 9 day of July, A. D. 1937.

GUNNAR H. NORDBYE,
Judge of the United States District Court for the District of Minnesota.

---

380 Return on Service of Writ.

United States of America,
District of Minnesota—ss.:

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named C. T. Jaffray as one of the Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, by handing to and leaving a true and correct copy thereof with him personally at Minneapolis in said District on the 9th day of July, A. D. 1937.

And at the same time and place did exhibit to the said C. T. Jaffray, the signature of the Court as it appears on the Original Citation.

JOHN J. FARRELL,
U. S. Marshal.
By J. H. Littell, Deputy.

---

381 Return on Service of Writ.

United States of America,
District of Minnesota—ss.:

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named S. M. Archer as one of the Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, by handing to and leaving a true and correct copy thereof with him personally at Minneapolis in said District on the 9th day of July, A. D. 1937.

And at the same time and place did exhibit to the said S. M. Archer the signature of the Court as it appears on the Original Citation.

JOHN J. FARRELL,
U. S. Marshal.
By J. H. Littell, Deputy.

---

382 Return on Service of Writ.

United States of America,
District of Minnesota—ss.:

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named R. H. M. Robinson as one of the Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, and who at this time is a resident without the State of Minnesota, by service on Cobb, Hoke, Benson, Krause and Faegre, attorneys for

the Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, by handing to and leaving a true and correct copy thereof with Haynor N. Larson, a member of above named Firm of Attorneys personally at Minneapolis in said District on the 9th day of July, A. D. 1937.

And at the same time and place did exhibit to the said Haynor N. Larson the signature of the Court as it appears on the Original Citation.

JOHN J. FARRELL,
U. S. Marshal.
By J. H. Littell, Deputy.

---

383 Return on Service of Writ.

United States of America,
District of Minnesota—ss.:

I hereby certify and return that I served the annexed Citation on Appeal on the therein-named Cobb, Hoke, Benson, Krause and Faegre, Attorneys for the Trustees of the Estate of the Minnesota and Ontario Paper Company, a Corporation, by handing to and leaving a true and correct copy thereof with Haynor N. Larson, a member of above named Firm of Attorneys, personally at Minneapolis in said District on the 9th day of July, A. D. 1937.

And at the same time and place did exhibit to the said Haynor N. Larson the signature of the Court as it appears on the Original Citation.

JOHN J. FARRELL,
U. S. Marshal.
By J. H. Littell, Deputy.

---

384 Service of the within Citation on Appeal is admitted this 9th day of July, 1937.

COBB, HOKE, BENSON,
KRAUSE & FAEGRE,
Attorneys for Plaintiff.

Endorsed: Filed in U. S. District Court on July 15, 1937.

---

385 Order Enlarging Citation.

Upon the application of the United States Attorney for the District of Minnesota in this behalf and the Court

being satisfied that the record on the appeal of above cause cannot be prepared and transmitted to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit within the period of forty (40) days specified in the original Citation issued on said appeal, and it being the intention of the undersigned shortly to be absent from his Chambers on vacation, and the undersigned is advised that one of the attorneys for department assigned to the preparation of the record on appeal is to be absent on vacation and may not return within the unexpired portion of the period specified in said original Citation—

Now, Therefore, It Is Ordered That the original Citation, dated and issued July 9, 1937, in above cause on appeal as aforesaid, and the original period of forty (40) days specified therein, be and the same hereby are enlarged and extended to and including September 27, A. D. 1937.

Dated at Minneapolis, Minnesota, this 2nd day of August, A. D. 1937.

GUNNAR H. NORDBYE,
United States District Judge for the District of Minnesota.

(Endorsed): Filed August 2, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

386 Stipulation of Parties as to Praecipe for Transcript of Record.

It Is Hereby Stipulated by and between the parties hereto, through their respective attorneys, that the following be included in the Praecipe for Transcript of the Record on Appeal in the above entitled case:

(1) Petition;

(2) Affidavit of Service by Juliana Helvorson and Frank Janes;

(3) Demurrer;

(4) Motion and Order amending the petition so as to include Archer as one of the plaintiffs;

(5) Order of July 1, 1935 sustaining the demurrer with leave to amend;

(6) Petition for and Order granting re-hearing;

(7) Order of July 30, 1935 modifying Order of July 1, 1935, and overruling demurrer.

(8) Answer;

(9) Reply;

(10) Motion and Order dated May 4, 1936 amending Section XVI of the Petition; (Included in Bill of Exceptions)

(11) Findings of Fact, Conclusions of Law, and Order for Judgment;

(12) Judgment;

(13) Bill of Exceptions (together with Stipulation and Order settling same);

(14) Notice of Appeal;

(15) Petition for Appeal;

(16) Assignment of Errors;

(17) Order allowing Appeal without Bond;

(18) Citation;

(19) Any Order enlarging Citation;

(20) Praecipe;

(21) Election to file typewritten transcript to be printed under supervision of the Clerk.

Dated this 10th day of September, A. D. 1937.

J. B. FAEGRE,
HAYNER N. LARSON,
Attorneys for Plaintiffs.

VICTOR E. ANDERSON,
United States Attorney.

LINUS J. HAMMOND,
Assistant United States Attorney.

J. E. GARVEY,
Special Assistant to the Attorney General.

(Endorsed): Filed September 10, 1937. Margaret L. Mullane, Clerk. By Chell M. Smith, Deputy.

---

387 Election as to Printing of Record.

To the Clerk of the United States District Court for the District of Minnesota:

In pursuance of the praecipe therefor filed in the above-entitled cause, you are hereby respectfully requested to prepare the transcript in typewritten form on the appeal by the above-named United States of America, defendant, taken from the judgment entered on the 9th day of April, 1937, in said cause in order that said transcript may be filed in the

office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit at the city of Saint Louis, Missouri.

And the said defendant United States of America hereby elects to have the record in said cause on appeal as aforesaid printed under supervision of the Clerk of the Circuit Court of Appeals for the Eighth Circuit. Dated this 17th day of July, A. D. 1937.

GEORGE F. SULLIVAN,
United States Attorney and Attorney for Defendant.

(Endorsed): Filed July 28, 1937. Margaret L. Mullane, Clerk. By Thomas H. Howard, Chief Deputy.

---

388 (Clerk's Certificate to Transcript.)

United States of America, District Court of the United States, District of Minnesota, Fourth Division.

I, Margaret L. Mullane, Clerk of said District Court, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing, consisting of 388 pages, including page 276A, numbered consecutively from 1 to 387, inclusive, is a true and complete transcript of the record and proceedings in said cause, wherein C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of the Minnesota and Ontario Paper Company, a corporation, Debtor, are plaintiffs, and United States of America is defendant, and of the whole thereof (except as modified by the stipulated praecipe of said parties, to be found at page 386 of said transcript) as appears from the original records and files of said Court; and I do hereby further certify and return that I have annexed to said transcript and included within said paging the original Citation, together with proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court at Minneapolis, in the District of Minnesota, this 25th day of September, A. D. 1937.

(Seal)
U. S. Dist. Court
Dist. of Minn.
Fourth Div.

MARGARET L. MULLANE,
Clerk.

By Thomas H. Howard,
Chief Deputy Clerk.

Filed Sep. 27, 1937. E. E. Koch, Clerk.

And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

Appearance of Mr. James W. Morris and Mr. Sewall Key as counsel for appellant

United States Circuit Court of Appeals for the Eighth Circuit

Case No. 11023

UNITED STATES, APPELLANT

v.

C. T. JAFFRAY AND R. H. M. ROBINSON

The Clerk will enter our appearances as Counsel for the Appellant.

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
Special Assistant to the Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sept. 27, 1937.

Appearance of Mr. Victor E. Anderson, Mr. J. E. Garvey, and Mr. Linus J. Hammond as counsel for appellant

The Clerk will enter my appearance as Counsel for the Appellant.

VICTOR E. ANDERSON,
United States Attorney for the District of Minnesota.
J. E. GARVEY,
Special Assistant Attorney General.
LINUS J. HAMMOND,
Assistant United States Attorney for the District of Minnesota.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Sept. 30, 1937.

Appearance of Mr. Warren F. Wattles as counsel for appellant

The Clerk will enter my appearance as Counsel for the Appellant.

WARREN F. WATTLES,
Special Asst. to Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Mar. 15, 1938.

102523—38——1

Appearance of counsel for appellees

The Clerk will enter my appearance as Counsel for the Appellees.

J. B. Faegre,
Hayner N. Larson,
1200 Northwestern Bank Building,
Minneapolis, Minnesota.

Cobb, Hoke, Benson, Krause & Faegre,
Of Counsel.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, Oct 6, 1937.

Order of submission

March Term, 1938

Tuesday, March 15, 1938

This cause having been called for hearing in its regular order, the same was argued by Mr. Warren F. Wattles, Special Assistant to the Attorney General, for appellant and by Mr. Hayner N. Larson for appellee.

Thereupon, this cause was submitted to the Court on the transcript of the record from said District Court and the briefs of counsel filed herein.

Opinion

United States Circuit Court of Appeals, Eighth Circuit

No. 11,023—May Term, A. D. 1938

United States of America, appellant

vs.

C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a Corporation, Debtor, appellees

Appeal from the District Court of the United States for the District of Minnesota

[June 27, 1938]

Mr. Warren F. Wattles, Special Assistant to the Attorney General (Mr. James W. Morris, Assistant Attorney General, Mr. J. Louis Monarch, Special Assistant to the Attorney General, Mr. Victor E. Anderson, United States Attorney, and Mr. Linus J. Hammond, Assistant United States Attorney, were with him on the brief) for Appellant. Mr. Hayner N. Larson (Mr. J. B. Faegre and Messrs. Cobb, Hoke, Benson, Krause & Faegre were with him on the brief) for Appellees.

Before GARDNER, SANBORN, and THOMAS, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the Court.

This is a suit brought by the trustees of the estate of Minnesota and Ontario Paper Company, which is in reorganization under Section 77B of the Bankruptcy Act, to recover from the United States overpayments of income taxes for the years 1922 to 1925 inclusive. The case was tried to the court, without a jury, upon an agreed statement of facts, and from a judgment in favor of the trustees, this appeal is taken.

For the years 1922 to 1925, inclusive, the taxpayer[1] made its returns and paid its income taxes to Levi M. Willcuts, Collector of Internal Revenue for the District of Minnesota, who was out of office when this suit was commenced. Timely claims for refund of taxes for each of the four years were filed. As a result of negotiations between the Commissioner and the taxpayer, it was determined that the taxpayer had overpaid its taxes for 1922 by $49,318.77, for 1923 by $29,427.69, for 1924 by $23,904.23, and for 1925 by $7,900.00; and the Commissioner issued certificates of overassessment so indicating.

For the years 1917, 1918, 1919, and 1920 the taxpayer had negligently understated and underpaid its income taxes. The Commissioner of Internal Revenue had determined a large deficiency for each of those years. The taxpayer filed with the Board of Tax Appeals petitions for redeterminations of the alleged deficiencies. On February 25, 1926, the taxpayer and the Commissioner entered into a stipulation for the determination and assessment of the deficiencies for the years 1917 to 1920, inclusive. The last paragraph of the stipulation read as follows:

"It is further stipulated and agreed that the understatement of the amount of the taxable net income as shown by the returns filed by the taxpayer herein for each of the taxable years 1917, 1918, 1919, and 1920 was due to negligence on the part of the taxpayer but without intent to defraud."

On the same day the Commissioner wrote the taxpayer as follows:

"Confirming the agreement made with the Commissioner of Internal Revenue on February 24, 1926, you are advised that the amount of the penalty to be assessed against you as the result of the negligent understatement of your tax liability for the taxable years 1917, 1918, 1919, and 1920 will be compromised by accepting a sum equal to 6 per cent per annum on the deficiencies determined and assessed in accordance with the stipulation this date entered into between the taxpayer and the representative of this office, from the date the deficiencies became due and payable to the date of payment."

---

[1] The word "taxpayer" as used in this opinion is intended to cover the Paper Company, its affiliates, and its trustees.

On February 26, 1926, a further stipulation was entered into in which it was agreed that the deficiencies should be determined by the Board of Tax Appeals in accordance with the stipulation entered into by the taxpayer and the Commissioner on February 25, 1926. On the same day the Board entered, in the proceedings relative to these taxes, an order that the tax liability should be so determined.

On March 6, 1926, there was filed with the Board a stipulation that the amount of the deficiency due from the taxpayer for each of the taxable years 1917, 1918, 1919, and 1920 was as follows:

	Tax	Penalty
1917	[illegible]	[illegible]
1918	[illegible]	[illegible]
1919	[illegible]	[illegible]
1920	[illegible]	[illegible]
Total	[illegible]	[illegible]

The Board entered three orders, similar in form, determining the deficiencies for the years 1917 to 1920, inclusive. The order relating to the 1917 tax was as follows:

"Now on this sixth day of March 1926 the above entitled appeal coming on for hearing on the stipulation of the taxpayer and the Commissioner, signed and executed by their respective counsel, and it appearing from said stipulation and other documentary evidence submitted that the true tax liability of the Minnesota & Ontario Paper Co. and its affiliated corporations for the taxable year 1917 is $531,073.65 of which the sum of $41,540.25 has heretofore been paid, and the sum of $901,379.16 has heretofore been assessed, and it further appearing that there is due a penalty of $227,633.03, no part of which has been assessed or paid:

"Now, therefore, it is considered and

"Ordered that the amount of tax deficiency and penalty due from the taxpayer be and the same is hereby redetermined for the year 1917 to be $489,533.40 tax, and $227,633.03 penalty, and that of the tax heretofore assessed there shall be abated the sum of $270,205.51, and the amount of the penalty of $227,633.03 shall be assessed and paid."

The stipulation referred to in the Board's orders was the stipulation last mentioned. The "other documentary evidence" referred to by the Board was a computation which was prepared by representatives of the Commissioner and representatives of the taxpayer, and filed with the Board March 6, 1926. This computation was made in accordance with the stipulation of February 25, 1926, settling the tax liability of the taxpayer for the years 1917 to 1920, inclusive. In this computation the amounts which the Board in its orders refers to as "penalty" are designated as "penalty interest on tax deficiencies" and as "interest." The total amount of "in-

rest" as shown by the computation is $788,879.21. The computation was approved in writing by the taxpayer and also by the Treasury Department.

Pursuant to the orders of the Board of Tax Appeals redetermining the deficiencies agreed to, the Commissioner caused the Collector of Internal Revenue for the District of Minnesota to make demand upon the taxpayer for the payment of the total amount found by the Board to be due for the years in question, which aggregated $3,044,810.77. Of this amount, $1,764,076.86 was the total tax deficiency for the years 1918, 1919, and 1920; $788,879.21 was "penalty" for the years 1917 to 1920, inclusive; and $2,321.30 was additional interest added by the Commissioner for the years 1919 and 1920. The taxpayer paid to the Collector, on March 22, 1926, the full amount demanded.

In its return for the year 1926 the taxpayer deducted from gross income $790,355.20 of the "penalty" and interest included in the amount which it paid to the Collector on March 22, 1926. By taking this deduction the taxpayer showed a net loss for 1926, and the carrying forward of this net loss, as authorized by Sections 117 (b) and (c) of the Revenue Act of 1928 (45 Stat. 791, 825, 826) left a tax liability of only $1,510.43 for 1927, and of $9,327.46 for 1928. The Commissioner, upon an audit of the taxpayer's returns for the years 1926 to 1928, inclusive, concluded that the deduction by the taxpayer of the "penalty" and interest paid in 1926 was improper, and he determined deficiencies as follows: for 1926, $42,884.00; for 1927, $47,445.12; for 1928, $14,270.13.

This was the situation which existed when, on August 31, 1933, the Commissioner notified the taxpayer that its claim for refund of taxes for the years 1922 to 1925, inclusive, were allowed to the extent indicated by the certificates of overassessment. The certificates stated that the overpayments allowed would not be refunded, but "credited" to taxes claimed to have been underpaid for other years. The principal of the overpayments for the years 1922 to 1925, inclusive, was credited by the Commissioner upon the alleged deficiencies determined by him for the years 1926 to 1928, inclusive. The interest upon such overpayments the Commissioner credited against withholding taxes claimed to have become due from the taxpayer in 1921, but which, it is now conceded, were not collectible.

The taxpayer thereupon commenced this suit to recover the overpayments for the years 1922 to 1925, inclusive, under Section 24 (20) of the Judicial Code [§ 41 (20), Title 28, U. S. C.] giving to the District Courts jurisdiction of suits against the United States for the recovery of taxes erroneously collected by a Collector who is out of office at the time suit is commenced.

The taxpayer contended that there were no deficiencies in taxes for the years 1926 to 1928, inclusive, and that the crediting by the Commissioner of the overpayments for the years 1922 to 1925, inclusive, against nonexistent deficiencies in taxes for other years constituted a denial of the taxpayer's refund claims.

The Government contended that the Commissioner, in allowing the overpayments and crediting them against alleged deficiencies for other years, had granted the taxpayer's claims for refunds; that the crediting of the overpayments to the claimed deficiencies for the years 1926 to 1928, inclusive, had the effect of paying or overpaying the taxes for those years, and that, since the taxpayer had filed no claims for the refund of taxes for those years, and since it was the action of the Commissioner, and not of the Collector, which caused the crediting of the overpayments to the alleged deficiencies, the court below was without jurisdiction. (See Lowe Brothers Co. v. United States, — U. S. —, 58 S. Ct. 896.) The Government also contended that the deduction made by the taxpayer in 1926 was properly disallowed, and resulted in the deficiencies determined by the Commissioner for the years 1926 to 1928, inclusive.

The court below decided that it was the overpayments which were made by the taxpayer to the Collector for the years 1922 to 1925, inclusive, which were in controversy; that the court had jurisdiction of the case; that the deduction made by the taxpayer from gross income in 1926, whether penalty or interest or both, was a lawful deduction, and hence the crediting by the Commissioner of the overpayments for the years 1922 to 1925 to the claimed deficiencies for the years 1926 to 1928 was unlawful to the extent that such deficiencies were created by the failure of the Commissioner to allow the deduction.

Two questions are presented for determination:

(1) Was this suit maintainable as one to recover the overpayments which were admittedly made to the Collector by the taxpayer for the years 1922 to 1925, and for which timely claims for refund had been filed?

(2) If so, was the amount paid by the taxpayer in 1926 as penalty, interest, or both, under its agreement with the Commissioner settling its tax liability for the years 1917 to 1920, deductible from its gross income in 1926?

1. The taxpayer had a right to maintain this suit for the recovery of the overpayments made by it to the Collector. United States ex rel. Girard Trust Co. v. Helvering, 301 U. S. 540, 542; United States v. Savings Bank, 104 U. S. 728; National Fire Ins. Co. v. United States (Ct. Cl.), 52 F. (2d) 1011, 1013, 1014; Ohio Steel Foundry Co. v. United States (Ct. Cl.), 38 F. (2d) 144, 149; Churchill v. Welch (D. C.), 12 F. Supp. 174; Libby, McNeill & Libby v. United States (Ct. Cl.), 9 F. Supp. 673, 680; American Woolen Co. v. United States (Ct. Cl.), 18 F. Supp. 783, 788; Pratt & Whitney Co. v. United States (Ct. Cl.), 6 F. Supp. 574, 10 F. Supp. 148, certiorari denied, 295 U. S. 760; Moses v. United States, 2 Cir., 61 F. (2d) 791, certiorari denied 289 U. S. 743; John F. Jelke Co. v. Smietanka, 7 Cir., 86 F. (2d) 470, certiorari denied 300 U. S. 669. The cause of action accrued at the time the overpayment was made to the Collector. Guettel v. United States, 8 Cir., 95 F. (2d) 229. The

crediting of the overpayments, by the Commissioner, against taxes due from the taxpayer for other years was a matter of defense, a justification for the failure to refund, and not a matter which destroyed the taxpayer's cause of action or ousted the court of jurisdiction. In the taxpayer's suit the Government, to justify its retention of the overpayments or any part of them, might assert any defense, legal or equitable, Stone v. White, 301 U. S. 532; Crossett Lumber Co. v. United States, 8 Cir., 87 F. (2d) 930, for "in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment • • • on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund," United States ex rel. Girard Trust Co. v. Helvering, supra [301 U. S.] p. 543; and the taxpayer could only recover so much of its overpayments as it could show that the Government was not entitled to retain.

We need not decide whether the taxpayer might have filed claims for refund of taxes for the years 1926 to 1928, inclusive, upon the theory that the taxes for those years had been overcredited.[5]

2. In computing the taxpayer's liability for the years 1917 to 1920, inclusive, for the purpose of settlement of the deficiencies for those years, the 6% interest upon the deficiencies which the Commissioner agreed to accept in "compromise" of "the penalty to be assessed • • • as the result of the negligent understatement of • • • tax liability for the taxable years 1917, 1918, 1919, and 1920," variously referred to as "penalty interest on tax deficiency," and "total interest," and "penalty," is shown to be $788,879.21. That amount must have been one of three things: (1) a pure penalty for negligence; (2) interest on taxes due the Government; or (3) both penalty and interest. No negligence penalty for the year 1917 could lawfully have been imposed, since there was then no statute which authorized the imposition of any penalty for a negligent understatement of the tax. (The Revenue Act of 1916, Sec. 18, imposed a penalty and interest for failure to file a return and for making a false return, 39 Stat. 775.) Section 250 (b) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1083, provided: "If the understatement is due to negligence on the part of the taxpayer, but without intent to defraud, there shall be added as part of the tax 5 per centum of the total amount of the deficiency, plus interest at the rate of 1 per centum per month on the amount of the deficiency of each installment from the time the installment was due." Since the total deficiency for the years 1918, 1919, and 1920 was $1,764,076.86, the 5% statutory penalty for negligence which might

[5] United States v. Swift & Co., 282 U. S. 466; Routzahn v. Reeves Bros. Co., 6 Cir., 59 F. (2d) 915, certiorari denied, 287 U. S. 650; Gans S. S. Line v. Bowers, 2 Cir., 82 F. (2d) 181, certiorari denied, 298 U. S. 676; United States v. Reeves Bros. Co., 6 Cir., 83 F. (2d) 121, certiorari denied, 299 U. S. 573; Moses v. United States, 2 Cir., 61 F. (2d) 791, certiorari denied, 289 U. S. 743; United States v. Piedmont Mfg. Co., 4 Cir., 89 F. (2d) 296; United States v. John Gallagher Co., 6 Cir., 83 F. (2d) 288; Lowe Bros. Co. v. United States, 6 Cir., 92 F. (2d) 905, affirmed May 16, 1938, — U. S. —, 58 S. Ct. 998. Compare Arthur C. Harvey Co. v. Malley (D. C.), 32 F. (2d) 885; Parks & Woolson Mach. Co. v. United States (Ct. Cl.), 58 F. (2d) 868, certiorari denied, 287 U. S. 634; Rosenstadt & Waller, Inc. v. United States (Ct. Cl.), 7 F. Supp. 287.

have been imposed was $88,203.84. (See United States v. Childs, 266 U. S. 304.) The Commissioner could not have intended to compromise a negligence penalty of $88, 203.84 by imposing a negligence penalty of $788,879.29. That would have been a contradiction in terms. What the taxpayer and the Commissioner evidently agreed to was that there should be added to the deficiencies in taxes for 1917, 1918, 1919, and 1920, 6% per annum, instead of the statutory 5% penalty and 1% per month interest upon the deficiencies for 1918, 1919, and 1920. It is as unreasonable to suppose that the exaction was all interest as to suppose that it was all penalty. So much of it as the taxpayer could show was interest was deductible from gross income in 1926.[3] It was unable to show that $88,203.84 of the exaction was not pure penalty, "the cost of delinquency." United States v. Childs, supra. The balance only of the exaction would, therefore, be deductible as interest.

But the Government contends that no part of the exaction may be regarded as interest because the Board in its orders, which were final and binding, referred to it as "penalty." It points to Backus v. United States, 59 F. (2d) 242 (certiaroari denied, 288 U. S. 610), in which the Court of Claims held that the taxpayer's stipulations for the settlement of its tax liability for the years 1917 to 1920 were binding and that the consent orders of the Board were final and conclusive.

The question whether the amounts denominated "penalty" in the orders of the Board included also interest and whether the payment of them would entitle the taxpayer to a deduction from its gross income for the year 1926 was not before the Board. The function which the Board performed was to give effect to the stipulation of the parties. Its consent orders were conclusive as to the liability of the taxpayer. What the Board referred to as "penalty," the taxpayer and the Commissioner had also referred to as "penalty" in their stipulation. In using the words "penalty interest" and "penalty," the Commissioner, the taxpayer, and the Board evidently had in mind the exaction authorized by statute in case of a negligent understatement of taxes. It is not unreasonable to refer to the entire statutory exaction as a "penalty," although that portion of it which is interest at 1% a month has been held to be mere compensation for delay.

We think that the orders of the Board did not convert so much of the "penalty" as was in fact deductible into a nondeductible item.

The court below concluded that so much of the exaction as was penalty and not interest would nevertheless, be deductible as an ordinary and necessary expense of operating the business of the tax-

[3] Interest paid upon federal taxes is a deductible item. Section 234(a)(2) of the Revenue Act of 1926 (44 Stat., Part 2, p. 9, 41) provides that "all interest paid or accrued within the taxable year on its [the taxpayer's] indebtedness" shall be allowed as a deduction from gross income. Interest paid upon federal taxes is interest on a debt. United States v. Childs, supra; Price v. United States, 269 U. S. 492, and is deductible. Penrose v. United States (D. C.), 18 F. Supp. 413; Klein's Federal Income Taxation, page 461, par. 16:18. See ruling of the Solicitor of Internal Revenue, O. 922, 2 Cumulative Bulletin, 227.

payer.[4] The reasons which the court gives for that conclusion are persuasive. It is conceivable that a negligence penalty might be imposed under circumstances which would warrant its deduction as an ordinary and necessary business expense, but we should hesitate to say that all negligence penalties were always, or were usually, of that character. A penalty paid for a negligent understatement of taxes does not readily fit into the concept of an ordinary and necessary business expense. No doubt there are degrees of negligence in such matters. Without knowing more than what the record here shows, we think it cannot be said that whatever was exacted from this taxpayer by way of punishment for negligence was an ordinary and necessary expense of its business. The Commissioner disallowed the deduction. His ruling has the presumption of correctness. Welch v. Helvering, 290 U. S. 111, 115. The difficulties encountered in attempting to determine what are and what are not ordinary and necessary business expenses are well illustrated by the language of that opinion on pages 114–115:

"Here, indeed, as so often in other branches of the law, the decisive distinctions are those of degree and not of kind. One struggles in vain for any verbal formula that will supply a ready touchstone. The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle."

And (page 115):

"Unless we can say from facts within our knowledge that these are ordinary and necessary expenses according to the ways of conduct and the forms of speech prevailing in the business world, the tax must be confirmed."

We cannot say that, "according to the ways of conduct and the forms of speech prevailing in the business world," every statutory penalty imposed for a negligent understatement of taxes due is an ordinary and necessary expense to be charged against income, and not against capital. The Board of Tax Appeals has consistently refused to treat exactions made by way of punishment for derelictions as ordinary and necessary expenses of a business. Backer, et al., Executors, 1 B. T. A. 214; Columbus Bread Co., 4 B. T. A. 1126; Great Northern Ry. Co., 8 B. T. A. 225; Atlantic Terra Cotta Co., 13 B. T. A. 1289; Bonnie Bros, Inc., 15 B. T. A. 1231; Kossar & Co., 16 B. T. A. 952; Terminal R. Association of St. Louis, 17 B. T. A. 1135, 1169; B. E. Levinstein, 19 B. T. A. 99. For example, in Kossar & Co., supra, the Board of Tax Appeals disallowed a claimed deduction for penalty and interest imposed in connection with a State franchise tax. In Great Northern Ry. Co. v. Commissioner, 8 Cir., 40 F. (2d) 372, this Court sustained the Board's refusal to permit the Great Northern Railway Company to deduct, as ordi-

[4] Sec. 234 (a) (1) of the Revenue Act of 1926, 44 Stat., Part 2, p. 9, 41, provides that in computing the net income of a corporation, there shall be allowed as a deduction "all the ordinary and necessary expenses paid or incurred."

nary and necessary expenses of its business, penalties paid for violation of federal statutes and regulations. See, also, Burrough Building Material Co. v. Commissioner, 2 Cir., 47 F. (2d) 178; C. R. I. & P. Ry. Co. v. Commissioner, 7 Cir., 47 F. (2d) 990; Tunnel R. R. of St. Louis v. Commissioner, 8 Cir., 81 F. (2d) 166. Compare National Outdoor Advertising Bureau, Inc. v. Helvering, 8 Cir., 89 F. (2d) 879, 881.

The taxpayer regards these cases as inapplicable, relating, as they do, to penalties for violations of criminal or quasi-criminal statutes, while here the penalty is purely civil. Helvering v. Mitchell, — U. S. —, 58 S. Ct. 630. It refers to Helvering v. Hampton, 9 Cir., 79 F. (2d) 358, and Anderson v. Commissioner, 10 Cir., 81 F. (2d) 457, 460, which recognize the right to deduct, as an ordinary and necessary business expense, damages for injuries to third persons resulting from tortious acts committed in the course of business. Damages for tort are imposed as compensation to an injured person, and not by way of punishment to the tort-feasor. McAllister v. Sloan, 8 Cir., 81 F. (2d) 707, 710; Miller v. Robertson, 266 U. S. 243, 257; Birdsall et al. v. Coolidge, 93 U. S. 64, 68–69; Dow v. Humbert et al., 91 U. S. 294, 299; Wicker v. Hoppock, 6 Wall. 94, 99. "The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution." United States v. Chouteau, 102 U. S. 603, 611. It is true that at one time the Treasury Department recognized that negligence penalties might be deductible depending upon the facts and circumstances under which they were imposed. O. 926, 1 Cumulative Bulletin, 241, 242. This ruling, it seems, was later revoked in G. C. M. 11, 358, XII–1, Cumulative Bulletin 29, on the theory that it was in conflict with Great Northern Ry. Co. v. Commissioner, supra [40 F. (2d) 372]; Burroughs Building Material Co. v. Commissioner, supra [47 F. (2d) 178], and C. R. I. & P. Ry. Co. v. Commissioner, supra [47 F. (2d) 990].

We go no further than to hold that in this case the taxpayer failed to show that so much of the exaction as was punitive was an ordinary and necessary expense of its business.

Our conclusions are as follows: (1) The suit was maintainable as one to recover the overpayments made by the taxpayer to the Collector for the years 1922 to 1925, inclusive. (2) Five per cent of the amount paid by the taxpayer in 1926 on deficiencies in taxes for the years 1918, 1919, and 1920 constituted a negligence penalty which was not deductible from gross income. The balance of the negligence "penalty" and interest paid by the taxpayer in 1926 was deductible from gross income.

The case is remanded to the court below with directions to amend the judgment in conformity with this opinion. When so amended, the judgment will stand affirmed.

Judgment

United States Circuit Court of Appeals, Eighth Circuit

May Term, 1938

Wednesday, June 29, 1938

No. 11023

UNITED STATES OF AMERICA, APPELLANT

vs.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR

Appeal from the District Court of the United States for the District of Minnesota

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to amend the judgment in conformity with the opinion of this Court filed herein June 27, 1938, and when so amended the judgment of the District Court will stand affirmed.

It is further ordered that no costs be taxed in favor of either of the parties in this Court.

And it is further ordered that a certified copy of the opinion of this Court be transmitted with the mandate when issued to the said District Court.

June 29, 1938

In the United States Circuit Court of Appeals, Eighth Circuit

No. 11023

UNITED STATES OF AMERICA, APPELLANT

vs.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR, APPELLEES

Appellant's petition for rehearing

To the United States Circuit Court of Appeals for the Eighth Circuit, and the Judges Thereof:

Comes now the United States of America and presents this its petition for rehearing of the above-entitled cause and in support thereof respectfully shows:

The Court has affirmed a judgment of the United State District Court for the District of Minnesota, Fourth Division, for recovery of income taxes paid by taxpayer and its affiliates) for the year 1922 although (on or about September 30, 1930, and) prior to the institution of the action in the court below (No. 3391 at law in that court) the taxpayer had instituted an action in the United States District Court of Minnesota, Third Division (No. 2245 at law) for the recovery of the same income taxes overpaid for the year 1922 (R. 135, R. 148–151) and that action had been "dismissed with prejudice" on August 1, 1933, by the United States District Court for the District of Minnesota, Third Division (R. 144). The taxpayer's action for the recovery of 1922 income taxes (No. 2245 at law) having been "dismissed with prejudice" the judgment of the United States District Court for the District of Minnesota, Third Division, in that case is forever conclusive, and the court below was concluded by the judgment of the District Court for the District of Minnesota, Third Division, in case No. 2245 at law in that court, and was without power, authority, or jurisdiction to render a judgment in the instant case in favor of the plaintiff for the recovery of any income taxes whatever for the year 1922, and this Court similarly erred in affirming the decision of the court below for recovery of 1922 taxes alleged to have been paid.

This point, although raised in the court below, was not stressed in the brief filed by the appellant before argument in this Court, since the theory urged by the United States, if approved by this Court, would have made consideration of this point unnecessary.

We deem it unnecessary to elaborate on the effect to be given the dismissal of a court action "with prejudice." The taxpayer's action for refund of its 1922 taxes deemed overpaid was dismissed "with prejudice" by the United States District Court, for the District of Minnesota, Third Division, on August 1, 1933 (R. 144). That having occurred, the taxpayer might never again bring an action for the recovery of its 1922 taxes. This does not mean that the taxpayer after August 1, 1933, was without any right of action of any kind in the situation in which it thereafter stood. It does mean that after the dismissal of the taxpayer's 1922 suit for refund (No. 2245 at law) with prejudice, the taxpayer could not sue again for refund of 1922 taxes and coud not maintain this action for 1922 taxes. Cf. Bowe-Burke Mining Co. v. Willcuts, 45 F. (2d) 394 (D. Minn.). What the taxpayer could do after the dismissal of its first suit is a different matter.

The court below was of the opinion (R. 108–109) that the taxpayer's original suit for refund of 1922 taxes having been dismissed with prejudice, the taxpayer could thereafter bring its present action for refund of 1922 taxes. The short answer to this is that the present action cannot be allowed without ignoring and denying any effect whatever to the dismissal with prejudice and instead treating

he dismissal with prejudice as a dismissal "without prejudice." That cannot be done. The dismissal with prejudice must be given effect.

The court below expressed the opinion (R. 109) that, after the dismissal of the taxpayer's original action for refund of 1922 taxes (No. 2245 at law) with prejudice, the taxpayer was in a position somewhat like that of a man who had brought suit on an unliquidated claim, taken the debtor's promissory note in some agreed amount, and then dismissed his suit on his unliquidated claim. The court observed (R. 109) that a suit on the note under such circumstances would not be affected by the prior dismissal with prejudice. What the court failed to observe was that the taxpayer in the instant case is not suing on the certificate of overassessment issued by the Commissioner in July 1933 (R. 145), for the year 1922 (before case No. 2245 at law was dismissed in the United States District Court for the District of Minnesota, Third Division), claiming that upon the issuance of the certificate of overassessment for 1922 an account was stated in its favor, permitting the taxpayer to sue the United States in the Court of Claims upon an account stated theory (Bonwit Teller & Co. v. United States, 283 U. S. 258), but on the contrary, the taxpayer is suing for precisely what it sued for in the action dismissed with prejudice, to-wit—income taxes alleged to have been overpaid for the year 1922. We submit that the taxpayer could not do this; that the dismissal of case No. 2245 at law in the United States District Court, for the District of Minnesota, Third Division, with prejudice, is a bar to the present action brought in 1934 for the recovery of income taxes paid by the taxpayer for the year 1922; and that the District Court had no jurisdiction to entertain the present action for 1922 taxes.

Wherefore, it is respectfully urged that the petition herein be granted, and that the opinion of the Court be withdrawn, and that an opinion be rendered herein reversing the decision of the court below, if not in its entirety, at least in so far as that court rendered judgment for the recovery of income taxes paid by the taxpayer for the year 1922.

Respectfully submitted.

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
WARREN F. WATTLES,
Special Assistants to the Attorney General.
VICTOR E. ANDERSON,
United States Attorney.
LINUS J. HAMMOND,
Assistant United States Attorney.

Certificate

The United States of America, appellant herein, by its attorneys, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
NORMAN D. KELLER,
WARREN F. WATTLES,
Special Assistants to the Attorney General.

[Endorsed:] Filed in U. S. Circuit Court of Appeals, July 11, 1938.

Order denying petition for rehearing

May Term, 1938

Monday, July 25, 1938

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same be, and it is hereby, denied.

July 25, 1938

Clerk's certificate

United States Circuit Court of Appeals, Eighth Circuit

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Minnesota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true, and complete copies of all the pleadings, record entries, and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles, and endorsements omitted in pursuance of the rules of the Supreme Court of the United States in a certain cause in said Circuit Court of Appeals wherein the United States of America was Appellant and C. T. Jaffray, R. H. M. Robinson, and S. M. Archer, as Trustees of the Estate of Minnesota and Ontario Paper Company, a corporation, Debtor, were Appellees, No. 11023, as full, true, and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the twelfth day of August A. D. 1938 a mandate was issued out of said Circuit Court of Appeals

in said cause, directed to the Judges of the District Court of the United States for the District of Minnesota.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourteenth day of October A. D. 1938.

[SEAL]

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1938

Supreme Court of the United States

Order allowing certiorari

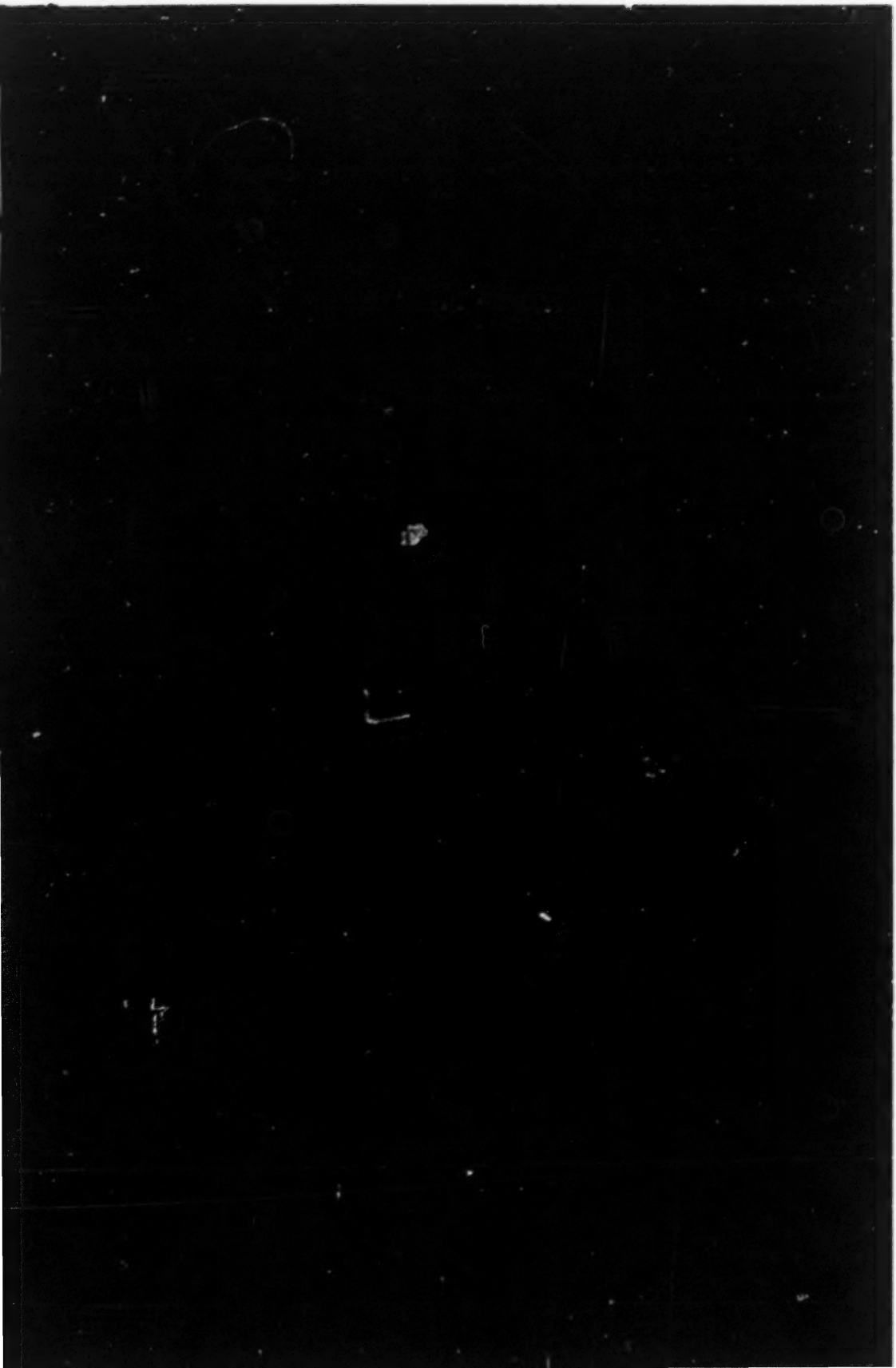
Filed November 21, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted and the case is assigned for argument immediately following No. 416.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice REED took no part in the consideration and decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1938



INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and other authorities involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ	4
Conclusion	11
Appendix	12

CITATIONS

Cases:	
Heiner v. *Diamond Alkali Co.*, 288 U. S. 502	7
Lowe Bros. Co. v. *United States*, 304 U. S. 302	5, 9
Moses v. *United States*, 61 F. (2d) 791, certiorari denied, 289 U. S. 743	11
Rock Island &c. R. R. v. *United States*, 254 U. S. 141	7
United States v. *Andrews*, 302 U. S. 517	8
United States v. *Chicago Golf Club*, 84 F. (2d) 914	7
United States v. *John Gallagher Co.*, 83 F. (2d) 368	9
United States v. *Garbutt Oil Co.*, 302 U. S. 528	8
United States v. *C. T. Jaffray*, 97 F. (2d) 488	10
United States v. *Savings Bank*, 104 U. S. 728	11
Welch v. *Obispo Oil Co.*, 301 U. S. 190	7
Williamsport Co. v. *United States*, 277 U. S. 551	7
Statutes:	
Judicial Code, as amended:	
Sec. 24 (U. S. C., Title 28, Sec. 41)	12
Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:	
Sec. 210	12
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Sec. 327	13
Sec. 328	14
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 284	16
Sec. 1113 (U. S. C., Title 26, Sec. 1672)	16
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 607 (U. S. C., Title 26, Sec. 1670)	17
Sec. 608 (U. S. C., Title 26, Sec. 1674)	17
Sec. 609 (U. S. C., Title 26, Sec. 1675)	18
Sec. 610 (U. S. C., Title 26, Sec. 1646)	18
Miscellaneous:	
H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34	19
S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42	21

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 416

UNITED STATES OF AMERICA, PETITIONER

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the First Circuit, entered in the above entitled cause on July 13, 1938, affirming the judgment of the District Court, limited, however, to the question of the jurisdiction of the District Court.

OPINIONS BELOW

The opinions of the District Court (O. R. 40–45; R. 16–23) [1] are reported in 49 F. (2d) 395 and 14 F.

[1] This case was twice tried and twice appealed. There are two separate records. The record on the first appeal, designated in this Court as Volume I, was received in evidence on the second trial and marked petitioner's Exhibit 1 (R. 24). All references to that original record will be designated "O. R."; otherwise all record references herein will be to the second record.

Supp. 868. The opinions of the Circuit Court of Appeals (R. 4–9; 65–68; 75–78) are reported at 60 F. (2d) 745, 95 F. (2d) 867, and 98 F. (2d) 132.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 78). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court has jurisdiction of a suit against the United States for the year 1917 seeking the recovery of internal revenue taxes in excess of $10,000 where the amount sought to be recovered constitutes a portion of the amount allowed by the Commissioner on a special assessment claim for 1917 which was credited against a barred deficiency for 1918 and where the claim for refund upon which jurisdiction is asserted was filed more than four years after the payment of the 1917 tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved will be found in the Appendix, *infra*, pp. 12–23.

STATEMENT

The following facts material to the question of jurisdiction are alleged in the petition (O. R. 1–3,

7–8) and admitted by answer (O. R. 3, 4–8–9) or are elsewhere in the records:

Respondent, a Massachusetts corporation, filed income and profits tax returns for 1917 and 1918 (O. R. 2–3) and paid taxes for those years in or prior to October 1920 (O. R. 3, 13).

Respondent requested a special assessment of its taxes for those years (O. R. 32–33, 37; R. 44, 52, 57–58). The request was granted, and the Commissioner determined an overassessment for 1917 of $91,570.34 and a deficiency for 1918 of $34,555.68 (O. R. 32–33). The Commissioner notified respondent (O. R. 30–31, 35; R. 56–59), assessed the 1918 deficiency on July 3, 1926 (O. R. 25), and issued a certificate of overassessment for 1917 in July 1926 (O. R. 23).

On July 27, 1926, the Commissioner sent the schedule of overassessments to the Collector for action. The Collector signed and returned the schedule to the Commissioner, certifying the application of $34,555.68 as a credit against 1918 taxes, and further certifying that $52,304.02 was the net amount refundable for 1917. On October 11, 1926, the Commissioner signed the schedule of refunds and credits (O. R. 51).

On November 28, 1927, the taxpayer filed refund claims for 1917 and 1918 in the amount of $34,555.68 (O. R. 2). A copy of the 1918 claim is in the record (R. 38), but the 1917 claim is not. The brief which accompanied the claim (R. 39–49) and which is

referred to in the 1918 claim, discloses that the claims are grounded on the contention that the additional assessment for 1918 was made after the running of the statute of limitations (R. 45–46).

These claims were rejected in January and February, 1928 (O. R. 2), and the action was commenced September 19, 1929 (O. R. 1).

On the first trial, respondent received a judgment n the sum of $44.07 (O. R. 12; 49 F. (2d) 395). Respondent appealed to the Circuit Court of Appeals for the First Circuit, which vacated the judgment and remanded the case to the District Court for further proceeding (R. 4–9; 60 F. (2d) 745). On the second trial, the District Court entered judgment for respondent for $34,555.68, plus interest (R. 15; 14 F. Supp. 868). The judgment was affirmed upon an appeal by the Government (R. 68; 95 F. (2d) 867). Upon rehearing, the judgment was reaffirmed (R. 78; 98 F. (2d) 132).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the District Court has jurisdiction to entertain this suit.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

The Circuit Court of Appeals for the First Circuit in the instant case has decided, *inter alia*, an important question relating to the jurisdiction of the

District Courts in a way clearly inconsistent with the applicable decisions of this Court. The present petition is limited to the question of jurisdiction—a question on which the law should be settled and clarified by this Court.

The Commissioner of Internal Revenue applied an amount in excess of $10,000, an overpayment of respondent's taxes for 1917, against a deficiency in its taxes for 1918 which was then barred by the statute of limitations.[1] Respondent's original petition in the District Court (O. R. 1–3) sought recovery, alternatively, for either 1917 or 1918. There can be no doubt, however, that no action can be maintained in the District Court to recover taxes for 1918, the year to which the overpayment was applied. That application was made by the Commissioner, and in *Lowe Bros. Co.* v. *United States*, 304 U. S. 302, this Court specifically held that since under those circumstances no suit could be maintained against a Collector, no suit could be maintained against the United States in the District Courts under Section 24 (20) of the Judicial Code, as amended, *infra*, p. 12. The court below apparently agreed (R. 78) that with respect to 1918 the *Lowe Bros. Co.* case was controlling.

[1] The Government also contended in the lower court that the 1918 deficiency was not barred. The decision was against the Government, and no review of that question is now sought.

It did, however, sustain the jurisdiction of the District Court with respect to the action to recover an overpayment of taxes for the year 1917. The theory upon which the jurisdiction was sustained is, we believe, demonstrably erroneous and in plain conflict with applicable decisions of this Court. We shall first state the objections to the analysis of the court below, and then state what we believe to be the proper analysis, under which the District Court was likewise plainly without jurisdiction.

The opinion below on rehearing states that the court is sustaining the contention of respondent that (R. 77–78)—

> the filing of the second claim for refund on November 28, 1927, and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. * * *; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1938 [1928], and the suit of the taxpayer was filed within two years, or on September 19, 1929.

The court below, in other words, predicated the action upon the 1927 claim for refund, treating that claim as a renewal of the "original claim" which the court below held to have been disallowed as to the portion of the 1917 overpayment credited against the 1918 deficiency.

The claim alleged to have been filed in 1927 for the refund of the 1917 taxes is not in the record, nor do the facts stated therein show that it was in any true sense an amendment to the original claim. Respondent, consequently, even fails to show that it has complied with Section 284 (b) (1) of the Revenue Act of 1926, requiring the filing of claims within four years after the payment of the tax. Cf. *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th); *Rock Island, &c., R. R.* v. *United States*, 254 U. S. 141, 142–143.

That being so, it is immaterial that suit was commenced within two years after denial of the so-called renewal claim. But we need not rest there. A further fatal objection to the approach taken by the court below lies in the fact, overlooked by that court, that the overassessment for 1917 results from a special assessment pursuant to Sections 210 and 328 of the Revenue Acts of 1917 and 1918 (O. R. 32, 37; R. 44, 52, 57–58). No action in any court could, therefore, have been predicated upon the rejection of the original claim. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Williamsport Co.* v. *United States*, 277 U. S. 551. Consequently, if it be true that the 1927 claim for refund was a "reopening" of the original claim, the essence of the 1927 claim would be for special assessment relief. Since jurisdiction could not have been predicated upon rejection of the

original claim, it can not now be predicated upon rejection of a proper amendment of the original claim, which would necessarily have to be on the same grounds, and this is true whether or not the claim was considered on its merits.

Nor can respondent sustain jurisdiction if the so-called renewal claim were based upon different grounds than those specified in the original claim. Apart from the wholly hypothetical basis upon which such a claim of jurisdiction is founded, it is plain that a renewal claim upon different grounds would be ineffective. In *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, and *United States* v. *Andrews*, 302 U. S. 517, this Court held that claims for refund based upon specific grounds may not properly be amended after the running of the statute of limitations to include new and different grounds. Nor is the result changed where the Commissioner passes upon the amended claim on the merits, since he has no power to waive the statute of limitations. *United States* v. *Garbutt Oil Co.*, *supra*, at p. 534.

For these reasons, therefore, we believe that it is impossible to support the jurisdiction of the District Court on the basis adopted by the court below. A proper analysis, we submit, also reveals that the District Court was plainly without jurisdiction.

Correctly viewed, the action of the Commissioner in crediting a part of the allowed overpayment for 1917 against the barred deficiency for 1918 constituted a collection of the tax for the latter year which

might be recovered by a suit against the United States in the Court of Claims. Cf. *Lowe Bros. Co.* v. *United States*, 304 U. S. 302. This is the clear implication of the decision in *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th). See also, *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 424.

This being so, no action could be maintained against the Collector for the year 1917, the year of overpayment, and, therefore, no action can be maintained in the District Court against the United States under Section 24 (20). The action by the Commissioner allowing the overpayment for that year has granted to the taxpayer, as to that year, everything that he demands. As the instant case clearly shows, the question in issue in a suit against the Collector for the year of overpayment would be, in reality, the question of the liability of the taxpayer for the year of the deficiency. Respondent here raises no questions with respect to the year 1917; the only real question raised by respondent herein was whether the tax for 1918 was barred by the statute.

The point is made clearer by considering the results of a contrary view. Such a view would mean that a taxpayer could bring an action for the year of overpayment, and in that action litigate the merits of any other year to which an application of the overpayment had been made by the Commissioner, without any claim ever having been filed for the later years, contrary to the express requirements of R. S.,

Section 3226. The holding of this Court in *Lowe Bros. Co.* v. *United States, supra,* that a suit for the year of deficiency could not be maintained against the Collector, could be effectively circumvented by the simple device of suing the Collector for the year of overpayment and litigating in that suit the merits of the taxpayer's liability for the year of deficiency. This is precisely the situation in *United States* v. *C. T. Jaffray,* 97 F. (2d) 488 (C. C. A. 8th), in which a petition for certiorari is also being filed on behalf of the United States, and to which this Court is respectfully referred.

Moreover, the decision below is in conflict with a decision of the Circuit Court of Appeals for the Second Circuit. As appears from the record in the instant case, respondent here sought a recovery of taxes for 1917, the year of overpayment, solely upon the alleged failure to refund an allowed overpayment. Its petition states (O. R. 3) that it is entitled to $34,555.68, the amount of the 1918 deficiency, either as "refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance." This was the position taken by the taxpayer throughout the proceedings below prior to the rehearing; it was the conclusion of the District Court; and, until the opinion on rehearing, it was the conclusion of the court below. In its opinion on rehearing the court below changed its opinion and held that the claim was not to be interpreted as based upon an allowed

overpayment. That decision, we believe, is plainly contradicted by the record. Consequently, the decision below, which allows a recovery against the United States under Section 24 (20) of the Judicial Code in a sum in excess of $10,000 in an action founded solely upon an alleged failure to repay an allowed overpayment, is directly in conflict with the holdings in *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; cf. *United States* v. *Savings Bank*, 104 U. S. 728, 734.

CONCLUSION

The decision of the court below is erroneous. The jurisdictional questions involved are important and the law with regard thereto should be clarified and settled by this Court. Wherefore, it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

OCTOBER 1938.

APPENDIX

Judicial Code, as amended:

> SEC. 24. The district courts shall have original jurisdiction as follows:
>
> * * * * *
>
> Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:

> SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the

net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several

classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in

the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1917, * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) * * *

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of

any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *. No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Title 26, Sec. 1672.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun

within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings

(no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred, shall be void if

payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608. In other words, the credit is void if either the deficiency or the overpayment is barred.

Section 609 applies to any credit made before or after the enactment of this Act.

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance

in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 act or section 606 of the new bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this act, of a claim filed within the proper period, and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

It seems desirable to provide some means whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other

cases involving the same point may be held in abeyance until the test suit is decided. Accordingly, the committee proposes to amend the House bill by inserting in section 608 a provision to the effect that in cases of the kind described the commissioner and the taxpayer may execute an agreement suspending the running of the statute of limitations for filing suit until final decision in the test case or cases named in the agreement. This amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill. It will be noted that the agreement is not that the parties thereto shall be bound by the test case in the settlement of the tax liability.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608.

Section 609 applies to any credit made before or after the enactment of this act.

U. S. GOVERNMENT PRINTING OFFICE: 1938

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes and other authorities involved	2
Statement	2
Specification of errors to be urged	6
Summary of Argument	7
Argument:	
I. The District Court did not have jurisdiction of this case as a suit to recover taxes for the year 1918	9
II. The District Court did not have jurisdiction of the case as a suit to recover taxes for the year 1917	10
A. The petition does not allege the filing of a claim for refund within four years of the payment of the tax for 1917, and the bringing of the suit within two years of the rejection thereof, or within five years of the payment of the tax	12
B. The petition does not allege that the tax for 1917 was erroneously or illegally collected	18
C. The petition attempts to state a cause of action on an allowed claim for 1917, which is not within the jurisdiction of the District Court	24
D. The credit of the allowed overpayment for 1917 against taxes assessed for 1918 precludes suit for the year 1917	25
III. The United States has not waived the jurisdictional defects of the petition, nor is it estopped to raise them	26
Conclusion	28
Appendix	29

CITATIONS

Cases:	
Arnson v. *Murphy*, 109 U. S. 238	20, 27
Cheatham v. *United States*, 92 U. S. 85	27
Chicago, B. & Q. Ry. Co. v. *Willard*, 220 U. S. 413	26

121843—39——1

Cases—Continued.

	Page
Daube v. *United States*, 289 U. S. 367	27
Finn v. *United States*, 123 U. S. 227	13, 27
First Nat. Bank v. *United States*, 2 F. Supp. 107	25
Gans Steamship Line v. *United States*, 65 F. (2d) 1016, certiorari denied, 290 U. S. 657	25
Hammond-Knowlton, Administratrix v. *Hartford Connecticut Trust Co., Executor*, 89 F. (2d) 175, certiorari denied, 302 U. S. 707	23, 25
Harvey Co., Arthur C. v. *Malley*, 60 F. (2d) 97, affirmed, 288 U. S. 415	25
Heiner v. *Diamond Alkali Co.*, 288 U. S. 502	23
Howbert v. *Penrose*, 28 F. (2d) 577	27
Jelke Co., John F. v. *Smietanka*, 86 F. (2d) 470, certiorari denied, 300 U. S. 669	13, 27
KVOS, Inc. v. *Associated Press*, 299 U. S. 269	13, 28
Lowe Bros. Co. v. *United States*, 304 U. S. 302	9, 10, 20
Maas & Waldstein Co. v. *United States*, 283 U. S. 583	23
Mansfield, C. & L. M. Ry. Co. v. *Swan*, 111 U. S. 379	26
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373	20, 27
Moore, et al., Executor v. *United States*, 61 F. (2d) 791, certiorari denied, 289 U. S. 743	25
Minnesota v. *United States*, No. 72, decided January 3, 1939	28
Munro v. *United States*, 303 U. S. 36	28
New York Trust Co. v. *United States*, 87 F. (2d) 889, certiorari denied, 301 U. S. 704	16, 17
Nichols v. *United States*, 7 Wall. 122	27
Otis Elevator Co. v. *United States*, 18 F. Supp. 87	25
Rond v. *United States*, 249 U. S. 503	13
Red Wing Malting Co. v. *Willcuts*, 15 F. (2d) 626, certiorari denied, 273 U. S. 763	13
Rock Island, &c., R. R. v. *United States*, 254 U. S. 141	12, 13, 27
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1	20, 27
Tucker v. *Alexander*, 275 U. S. 228	27
United States v. *Andrews*, 302 U. S. 517	16, 19
United States v. *Chicago Golf Club*, 84 F. (2d) 914	13, 27
United States v. *Fell & Tarrant Co.*, 283 U. S. 269	13, 26, 27
United States v. *Garbutt Oil Co.*, 302 U. S. 528	16, 19, 26
United States v. *Jaffray*, No. 437, present Term	11, 12, 26
United States v. *Memphis Cotton Oil Co.*, 288 U. S. 62	16, 27
United States v. *Michel*, 282 U. S. 656	12, 27
United States v. *Savings Bank*, 104 U. S. 728	25
Welch v. *Obispo Oil Co.*, 301 U. S. 190	23
Williamsport Co. v. *United States*, 277 U. S. 551	23

Statutes:

	Page
Judicial Code, as amended:	
Sec. 24 (U. S. C., Title 28, Sec. 41)	19, 29
Act of March 3, 1887, c. 359, 24 Stat. 505, 506	27
Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:	
Sec. 210	18, 29
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Sec. 327	30
Sec. 328	31
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 284	12, 33
Sec. 1113 (U. S. C., Title 26, Sec. 1672)	12, 34
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 607 (U. S. C., Title 26, Sec. 1670)	34
Sec. 608 (U. S. C., Title 26, Sec. 1674)	34
Sec. 609 (U. S. C., Title 26, Sec. 1675)	35
Sec. 610 (U. S. C., Title 26, Sec. 1646)	36
Revised Statutes, Sec. 3226 (U. S. C., Title 26, Sec. 1672–1673)	10, 34

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 416

UNITED STATES OF AMERICA, PETITIONER

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the District Court (O. R. 40–45; R. 16–23)[1] are reported in 49 F. (2d) 395 and 14 F. Supp. 868. The opinions of the Circuit Court of Appeals (R. 4–9; 65–68; 75–78) are reported in 60 F. (2d) 745, 95 F. (2d) 867, and 98 F. (2d) 132.

[1] This case was twice tried and twice appealed. There are two separate records. The record on the first appeal, designated in this Court as Volume I, was received in evidence on the second trial and marked petitioner's Exhibit 1 (R. 24). All references to that original record will be designated "O. R."; otherwise all record references herein will be to the second record, now designated as Volume II.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 13, 1938 (R. 78). The petition for a writ of certiorari was filed October 13, 1938, and granted November 21, 1938. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the District Court has jurisdiction of a suit against the United States for the year 1917 seeking the recovery of internal-revenue taxes in excess of $10,000 where the amount sought to be recovered constitutes a portion of the amount allowed by the Commissioner on a special assessment claim for 1917 which was credited against a barred deficiency for 1918 and where the claim for refund upon which jurisdiction is asserted was filed more than four years after the payment of the 1917 tax.

STATUTES AND OTHER AUTHORITIES INVOLVED

The statutes and other authorities involved will be found in the Appendix, *infra*, pp. 29–36.

STATEMENT

The following facts material to the question of jurisdiction are alleged in the petition, filed September 19, 1929 (O. R. 1–3, 7–8):

Respondent is a Massachusetts corporation. The Collectors of Internal Revenue in office at all

times mentioned in the petition were not in office at the date of the filing of the petition (O. R. 1).

Paragraph Sixth of the petition (O. R. 2) alleged:

> Petitioner [respondent here] duly filed with the Collector of Internal Revenue for the District of Massachusetts the income and profits tax returns for the calendar years 1917 and 1918 and the relevant dates of filing of all returns; the dates and amounts of all payments; the dates of the claims for refund; and the dates of the rejection or denials of the said claims for refund are herein detailed as follows:
>
> The final 1917 return was filed on or before June 1, 1918. The final [1918] return was filed on or before June 15, 1919. There was paid on account of the 1917 original return—list page 1395—line 17—$277,586.23, and, in addition, August 1920, list page 31—line 1—$6,510.54—total, $284,096.77. There was paid for 1918 list, per original return, account No. 403,152, including interest of $345.15, the sum of $242,384.72 and there was also paid August 1920 list, additional, page 32—line 2—$163.25, making a total of $242,-547.97, from which, when the interest for delay in filing and paying in 1919 was subtracted, there was left a tax paid of $242,-202.82. Final communication was received January 23, 1926, showing overassessment for 1917 without interest of $91,570.34 and a further additional proposed assessment for

1918 of $34,555.68; to these two proposals the taxpayer entered no objection and in due course, subject to inability to pay on the part of the Treasury Department through lack of cash, the overassessment for 1917 less the additional tax for 1918 plus interest was received in the fall of 1927 undated by the collector, as per his overassessment certificate.

The taxpayer filed, and possesses acknowledged receipt of said action, refund claims for 1917 and 1918 in the amount of $34,555.68 with request for interest on November 28, 1927. These claims were rejected by letters received both in January and February 1928.

The petition alleged as the ground of suit that the Commissioner of Internal Revenue when preparing his refund or overassessment of $91,570.34 for 1917 credited it against the $34,555.68 for 1918, and returned to the taxpayer only the net difference plus interest, without ever having assessed the additional tax for 1918 (O. R. 2). The petition prayed a refund of $34,555.68 "as refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance" (O. R. 3).

The answer (O. R. 3–4, 8–9) admitted all of the allegations of the petition except the allegation or suggestion or implication that the additional tax of $34,555.68 for 1918 was not assessed or was assessed at any other time than in July 1926.

Elsewhere in the records will be found the following facts:

Respondent paid its taxes for 1917 in or prior to October, 1920 (O. R. 13). It requested a special assessment of its taxes for 1917 and 1918 (O. R. 32–33, 37; R. 44, 52, 57–58). The request was granted, and the Commissioner determined an overassessment for 1917 of $91,570.34 and a deficiency for 1918 of $34,555.68 (O. R. 32–33). The Commissioner notified respondent (O. R. 30–31, 35; R. 56–59), assessed the 1918 deficiency on July 3, 1926 (O. R. 25), and issued a certificate of overassessment for 1917 in July 1926 (O. R. 23).

On July 27, 1926, the Commissioner sent the schedule of overassessments to the collector for action. The collector signed and returned the schedule to the Commissioner, certifying the application of $34,555.68 as a credit against 1918 taxes, and further certifying that $52,304.02 was the net amount refundable for 1917. On October 11, 1926, the Commissioner signed the schedule of refunds and credits (O. R. 51).

On some undisclosed date prior to September 16, 1925, respondent filed claims for refund for 1917. On November 28, 1927, respondent filed another claim for refund for 1917 and a claim for refund for 1918, each in the amount of $34,555.68, referred to in the petition (O. R. 2). The 1917 claim was not offered in evidence, and is not in the record. A copy of the 1918 claim was offered in evidence by

the Government, but apparently was not received (R. 30). A copy of it, however, is in the record (R. 38). The brief which is referred to in the 1918 claim (R. 39–49), discloses that the claims filed on November 28, 1927, are grounded on the contention that the additional tax for 1918 had never actually been assessed and that assessment could not then be made "as the Waiver expired December 31, 1926" (R. 46, 48).

Both claims were rejected in January and February 1928 (O. R. 2). The action was commenced on September 19, 1929 (O. R. 1).

On the first trial, respondent received a judgment in the sum of $44.07 (O. R. 2; 49 F. (2d) 395). Respondent appealed to the Circuit Court of Appeals for the First Circuit, which vacated the judgment and remanded the case to the District Court for further proceeding (R. 4–9; 60 F. (2d) 745). On the second trial, the District Court entered judgment for respondent for $34,555.68, plus interest (R. 15; 14 F. Supp. 868). The judgment was affirmed upon an appeal by the Government (R. 68; 95 F. (2d) 867). Upon rehearing, the judgment was reaffirmed (R. 78; 98 F. (2d) 132). A petition for a writ of certiorari was filed on October 13, 1938, and was granted on November 21, 1938 (R. 81).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the District Court had jurisdiction to entertain this suit.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

SUMMARY OF ARGUMENT

This suit was instituted in the District Court to recover from the United States a sum in excess of $10,000 representing the amount of an overpayment determined by the Commissioner of Internal Revenue for the year 1917 which was credited by the Commissioner against a deficiency for the year 1918 allegedly assessed after the expiration of the statute of limitations. The petition filed in the District Court attempted to state a cause of action for 1917 on the theory of an illegally withheld allowed overpayment, or, alternatively, for 1918 on the theory of an illegally collected tax.

The District Court was clearly without jurisdiction as to 1918, because the taxes for that year were not collected by a collector of internal revenue but were satisfied by the credit made by the Commissioner. The respondent apparently concedes lack of jurisdiction as to 1918.

The District Court was without jurisdiction as to the year 1917, because, (1) it was not alleged and proved that a claim for refund was filed within four years of the payment of the tax for that year, and that suit was brought within two years of the rejection of such claim; (2) it was not alleged and proved that the collector wrongfully collected taxes for 1917; (3) the cause was grounded solely upon

an allowed overpayment; (4) the credit of the allowed overpayment for 1917 against taxes assessed for 1918 precludes suit for the year 1917.

The judgment of the court below should be reversed, with directions to dismiss the case for lack of jurisdiction.

ARGUMENT

The Commissioner of Internal Revenue applied an amount, in excess of $10,000, which was an overpayment of respondent's taxes for the calendar year 1917, against a deficiency in its taxes for the calendar year 1918. The court below has held that the deficiency for 1918 was not assessed within the statutory period as extended by waiver.[2]

---

[2] The Government contended in the courts below that the time for assessment of the 1918 deficiency had been extended by waivers beyond the date when the assessment was made. The District Court so held upon the first trial (O. R. 41–43). That decision was reversed by the Circuit Court of Appeals because of the exclusion of certain evidence (R. 4–8). Upon the second trial five waivers were introduced. Under these waivers the assessment of 1918 taxes was timely if (1) the first four waivers had been tacked, or (2) if the fifth waiver was valid although not signed by the Commissioner, or (3) if the word "waiver" on the assessment list signed by the Commissioner were held to refer to the fifth waiver, or (4) if sufficient consent in writing by the Commissioner were found in the fact that the Commissioner had by letter requested the execution of the fifth waiver. Decision went against the Government on all of the points. The court below affirmed, holding, *inter alia*, that certain of the questions raised by the Government had not been properly preserved for appellate review (R. 66–68). The petition for certiorari, however, asked for a review by this Court only of the question of the jurisdiction of the District Court.

Respondent's petition in the District Court (O. R. 1–3) sought recovery, alternatively, of 1917 taxes as being erroneously and illegally withheld after allowance, or of 1918 taxes as having been erroneously and illegally collected (O. R. 1, 3). We believe that the court was without jurisdiction to entertain the suit to recover taxes for either year.

I

THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THIS CASE AS A SUIT TO RECOVER TAXES FOR THE YEAR 1918

There can be no doubt that the District Court had no jurisdiction to entertain this suit as one to recover taxes for the year 1918, the year to which the overpayment was applied. In *Lowe Bros. Co.* v. *United States*, 304 U. S. 302, a suit had been brought which was construed as a suit to recover an overpayment of taxes in excess of $10,000 for the year to which the deficiency had been applied (1917, in that case). This Court pointed out that suits under Section 24 (20) of the Judicial Code, *infra*, p. 29, against the United States for sums in excess of $10,000 were in substitution of suits which might have been had against the collector had he still been in office. Therefore, since for the year to which the overpayment had been applied there had been no collection by the collector of the excessive taxes, nor any other act which would subject the collector to personal liability, the suit could not be maintained

against the United States. 304 U. S. at 306. The court below apparently agreed (R. 78) that with respect to 1918 the *Lowe Bros.* case was controlling, and respondent made no argument to the contrary in its brief in opposition to the petition for certiorari.

II

THE DISTRICT COURT DID NOT HAVE JURISDICTION OF THE CASE AS A SUIT TO RECOVER TAXES FOR THE YEAR 1917

On the second appeal, the court below held that the District Court had jurisdiction of this case because Section 3226 of the Revised Statutes, *infra*, p. 34, did not apply since "in the last analysis [the action] is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax" (R. 66). The Government moved for a rehearing, contending that inasmuch as the amount in suit was more than $10,000, the District Court under Section 24 (20) of the Judicial Code did not have jurisdiction, whether the suit be deemed to be grounded on the Commissioner's certificate of overassessment as an account stated, or, as seems to have been the theory of both the original petition and the decision of the court, on a balance due on an allowed claim.

The rehearing was granted, and a further opinion handed down (R. 75–78). In that opinion the court held that the suit "was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly

applying it to an invalid assessment of a deficiency tax for 1918" (R. 78). By treating the consideration by the Commissioner of the 1927 claim for refund filed on November 26, 1927, as a reopening of an original claim for 1917, which original claim the court states was timely filed, the court reached the conclusion that the provisions of Section 3226 had been met, suit having been brought within two years of the rejection of the claim for 1917, filed in November 1927.

We submit that there are at least three separate respects in which the petition fails to sustain the theory upon which jurisdiction was founded by the court below. The petition is deficient in that (1) it does not allege the filing of a claim for refund within four years of the payment of the tax for 1917, and the bringing of suit within two years of the rejection thereof, or within five years of the payment of the tax; (2) it does not allege that the tax for 1917 was erroneously or illegally collected; and (3) it attempts to state a cause of action on an allowed claim for 1917. We shall discuss these below. Finally, we submit that in addition to these deficiencies, there is a more fundamental objection to the petition based upon the fact that an overpayment for 1917 had been determined by the Commissioner of Internal Revenue, and had been applied in satisfaction of taxes assessed against the taxpayer for other years. Under those circumstances, as we discuss in more detail in our brief in *United*

States v. *Jaffray*, No. 437, to be argued herewith, the proper year for suit is the year to which the overpayment was applied, and the forum, if the claim exceeds $10,000, is the Court of Claims.

A. The Petition Does Not Allege the Filing of a Claim for Refund Within Four Years of the Payment of the Tax for 1917, and the Bringing of the Suit Within Two Years of the Rejection Thereof, or Within Five Years of the Payment of the Tax

Section 3226 of the Revised Statutes, reenacted in Section 1113 (a) of the Revenue Act of 1926, *infra*, p. 34, provides that no suit shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been filed with the Commissioner of Internal Revenue, and that no such suit shall be begun after the expiration of five years from the date of the payment of the tax unless the suit is begun within two years after the disallowance of the part of the claim to which the suit relates. Section 284 (b) of the Revenue Act of 1926, *infra*, p. 33, provides that no refund shall be made after four years from the time the tax was paid in the case of a tax imposed by the Revenue Act of 1917 unless before the expiration of such period a claim therefor is filed by the taxpayer.

It is well settled that compliance with these provisions is a jurisdictional prerequisite to the maintenance of suit both as against the United States and as against collectors of internal revenue. *United States* v. *Michel*, 282 U. S. 656; *Rock Island*

&c. R. R. v. *United States*, 254 U. S. 141, 142–143; *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th); *Red Wing Malting Co.* v. *Willcuts*, 15 F. (2d) 626 (C. C. A. 8th), certiorari denied, 273 U. S. 763; *John F. Jelke Co.* v. *Smietanka*, 86 F. (2d) 470 (C. C. A. 7th), certiorari denied, 300 U. S. 669. See also *Rand* v. *United States*, 249 U. S. 503, 510; *Finn* v. *United States*, 123 U. S. 227.

While the petition, filed in the District Court on September 19, 1929 (O. R. 1–3), alleges the legal conclusion that all claims for refund and other action requisite to the suit had been duly made, this general allegation is followed by a particular averment that the dates and amounts of all payments, the dates of the claims for refund and the dates of the rejections or denials of the claims for refund are "herein detailed as follows". Cf. *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 277. The averment which followed as to the payment of the tax for 1917 is not specific as to dates, but the inference is that $277,586.23 of the tax was paid prior to the August 1920 list and that an additional $6,510.54 was paid pursuant to the August 1920 list.[1] The averment as to the filing of claims for refund which followed stated that the taxpayer filed refund claim for 1917 in the amount of $34,555.68 on November 28, 1927. Since all of the tax for 1917 was paid on

[1] At the first trial it was agreed that $277,586.23 of the 1917 taxes was paid in installments in 1918 and 1919, and that the additional $6,510.54 was paid on October 14, 1920 (O. R. 13).

or prior to October 14, 1920, and since the only claim for refund alleged to have been filed was that of November 28, 1927, it is readily apparent that the petition itself fails to allege a fulfillment of the condition precedent to suit that a claim for refund be filed within four years after the payment of the tax.

On the rehearing in the court below, the respondent went beyond the petition, and urged that the certificate of overassessment issued by the Commissioner (O. R. 23) conclusively shows that it filed a timely claim for refund of taxes for the year 1917. Even if the allegations of the petition may be thus supplemented, we find nothing in the certificate of overassessment stating that any claims for refund had been filed. The reference in that instrument to claims for refund was that there had been a "consideration of all the claims (*if any*) filed by" the respondent. [Italics supplied.] However, in statements sent to the respondent on September 16, 1925 (O. R. 30–33), and January 23, 1926 (O. R. 36–37), it does appear that the respondent had filed three claims for refund for 1917 taxes prior to the November 28, 1927, claim, but the dates of the filing of these claims are not shown and the claims themselves were not introduced in evidence. Not only, therefore, does the petition fail to allege the filing of a claim for refund within four years of the payment of the tax for 1917, but the record as it stands totally fails to provide proof which would support such an allegation if it had been made.

Furthermore, even if it should be assumed that the claims for refund referred to in the statement of September 16, 1925 (O. R. 32), were timely filed, the same statement shows that the claims were being allowed to the extent of $91,570.34 based upon the respondent's application for special assessment under the provisions of Section 210 of the Revenue Act of 1917, *infra,* p. 29, and that the claims would be rejected for $30,144.75. It is the credit on October 11, 1926, of $34,555.68 of the allowed amount against a deficiency for 1918 assessed July 3, 1926, that the respondent complains of in this case, and it was this credit which the court below held constituted a denial of the respondent's claim for 1917 for that amount. If it be assumed that the credit of $34,555.68 of the 1917 allowed overpayment against the 1918 deficiency constituted in effect a denial of the respondent's claim for 1917 to that extent, then it is apparent that the present suit instituted on September 1[illegible], 1929, was not brought within the two years after disallowance, as required by Section 3226 of the Revised Statutes, unless something additional be shown to have tolled the time for bringing suit.

The respondent contended below that the time for bringing suit had been tolled by the filing of the November 28, 1927, claim for 1917, which, the respondent urged, had the effect of a request for a reconsideration of the "denial" of the earlier claim. The court below, assuming that there had been a

timely-filed earlier claim, sustained the contention of the respondent that there had been a reopening of that claim, saying (R. 77–78)—

> the filing of the second claim for refund on November 28, 1927, and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. * * *; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1938 [1928], and the suit of the taxpayer was filed within two years, or on September 19, 1929.

Considered as an original claim for refund, the claim for 1917 filed on November 28, 1927, of course would have no legal effect, for it was filed more than four years after 1920, the date on which the last of the taxes for 1917 had been paid. *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. It also could not be treated as an amendment to an earlier filed claim for 1917, for such claim had theretofore been definitively disposed of either by its allowance in the schedule of refunds and credits signed by the Commissioner on October 11, 1926 (O. R. 51), or its putative disallowance by the act of the Commissioner in the same instrument of crediting part of the allowed overpayment against the deficiency for 1918. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 72; *New York Trust Co., Executor* v.

United States, 87 F. (2d) 889 (C. C. A. 2d), certiorari denied, 301 U. S. 704.

As we have pointed out above, neither the claim for refund for 1917 filed on November 28, 1927, nor any other claim for 1917 is in the record. It was therefore speculation on the part of the court below to hold that the filing of the November 28, 1927, claim and its consideration on its merits was a reopening of an earlier filed claim. While we know that the earlier claim or claims were based upon a request for special assessment, which was granted, we do not know from the present record what was the ground of the November 1927 claim. Without knowing the ground of the November 1927 claim it was improper, we submit, for the court below to conclude that it was a request by the taxpayer for a reopening and reconsideration of an earlier rejected claim. For all we know, the November 1927 claim might have attempted to assert an entirely different ground from that relied upon in the original claim. If it did, that claim would itself be treated as an original claim, and, as we have shown above, so considered would be bad.

Since allegation and proof of the timely filing of a claim and a showing that suit was brought within two years of the rejection of the timely claim are jurisdictional, we submit that the respondent's suit must be dismissed for its failure to establish those essential facts.

B. The Petition Does Not Allege That the Tax for 1917 Was Erroneously or Illegally Collected

Furthermore, even under the lenient view which the court below has taken of the respondent's allegations and proof of jurisdictional facts, we submit that the District Court was without jurisdiction of this case. The court below has assumed that there was an original claim for refund for 1917 which was timely filed. It has treated the crediting in 1926 of part of the overpayment found by the Commissioner against the deficiency for 1918 as being, for purposes of suit, a *pro tanto* disallowance of the claim for 1917. And it has treated the consideration of the November 1927 claim for 1917 as being a reopening of the "disallowed" original claim. It has concluded that the suit was brought to recover that part of the claim for 1917 overpayment which had been disallowed by virtue of the credit, and that its institution in 1929 was timely because within two years of the rejection of the November 1927 claim.

The holding of the court below, therefore, necessarily is that the suit is grounded on the original claim for refund for 1917. But a fatal objection to such a holding lies in the fact, overlooked or ignored by the court below, that the original claims for 1917 were for special assessment under Section 210 of the Revenue Act of 1917 (O. R. 32), and the overpayment found by the Commissioner, part of which was credited against 1918 taxes and which

part the respondent is here seeking to recover, resulted from the granting of the request for special assessment.[4] See Brief in Opposition, p. 21. In these circumstances, it is impossible to say that there was an original erroneous or illegal collection by the collector—a condition precedent to maintenance of a suit in the District Court.

Section 24 of the Judicial Code, *infra*, p. 29, gives to the District Courts concurrent jurisdiction with the Court of Claims of all claims against the United States not exceeding ten thousand dollars, founded upon the Constitution of the United States or any law of Congress, and—

> of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

---

[4] The same conclusion would be reached if the November 28, 1927, claim for 1917 be treated as an amendment of an earlier claim, for the amendment, to be good, must have been upon the same grounds. *United States* v. *Andrews*, *supra*; *United States* v. *Garbutt Oil Co.*, *supra*.

The common-law right of action to recover money exacted by a collector of internal revenue as taxes did not arise unless there was an erroneous or illegal collection by the collector—an exaction unauthorized by law. There must have been an unwarranted transaction, and the party to be charged therefor, the collector, must have been a party to the transaction. *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373; *Smietanka* v. *Indiana Steel Co.,* 257 U. S. 1; *Arnson* v. *Murphy,* 109 U. S. 238. No statute has enlarged the collector's common law liability to suit. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302, 306, *supra.* The terms of the amendment to Section 24 of the Judicial Code quoted above conferring jurisdiction upon District Courts of suits against the United States to recover taxes in excess of $10,000 are: "tax alleged to have been erroneously or illegally assessed or collected" or "any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws," if the collector by whom the tax was collected is dead or is not in office at the commencement of suit. The obvious purpose of the amendment, as this Court held in *Lowe Bros. Co.* v. *United States, supra,* was to permit a substitution of a suit against the United States for the suit previously allowed against the collector whenever the amount claimed exceeds $10,000 and the collector is out of office, and accordingly collection by the collector is the *sine qua non* of jurisdiction. Since the very gist of the right against the collector personally is

his participation in an exaction unauthorized by law, it must necessarily follow that no action can be maintained against him, or against the United States in the substituted suit under Section 24 of the Judicial Code, unless the action be founded upon an alleged wrongful collection.

The petition filed in the present case (O. R. 1–3) does not at any place allege a wrongful or erroneous collection of taxes for 1917. Its allegations are that the respondent received from the Commissioner of Internal Revenue a final communication showing an overassessment for 1917 of $91,570.34 and the crediting of $34,555.68 against a tax for 1918 which the respondent alleged had never been assessed. The action, the respondent states (O. R. 1), is:

> one to recover back Federal war profits taxes, excess profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally withheld from the said petitioner [obviously relating to 1917] or erroneously and illegally collected from the said petitioner [obviously relating to 1918] * * *.

And then again in paragraph eighth of the petition the respondent stated (O. R. 3):

> Wherefore the petitioner claims a refund of $34,555.68 for 1918, representing an amount within less than four years which has been taken out of the 1917 proposed refund and employed to pay the 1918

> deficiency without having been assessed, hence claiming same as refund now for 1918 illegally paid, *or requesting the said same amount for 1917 as never having been fully paid after allowance.* * * * (Italics supplied.)

From these allegations of the petition it seems clear that the respondent was not attempting to state a cause of action founded upon an alleged erroneous or unlawful *collection* of the tax for the year 1917, but, on the contrary, was endeavoring to state a cause on an alleged wrongful withholding of part of an allowed claim. See pp. 25–25, *infra.*

Nor was the failure of the respondent to allege a wrongful collection inadvertent. It was due to a realization of its inability to prove such an allegation if one had been made. Computed according to the normal statutory method the taxes collected by the collector for 1917 were, so far as the allegations of the petition and facts appearing in the record show, due from the respondent. It was only pursuant to the granting of the request of the respondent for the special discretionary administrative relief under Section 210 of the Revenue Act of 1917 that an overpayment of taxes for that year was determined.[5] If the original claim for refund re-

---

[5] This is clear from the Statement (O. R. 32), and it is admitted by respondent. It states (Brief in Opposition, pp. 19–20):

> Even if the question of special assessment had any bearing on the case it is clear that here special assessment was allowed and the Commissioner of Internal Revenue refused to pay over or refund the amount of overpayment thus determined * * *.

questing special assessment had been denied, instead of granted, it is perfectly well settled that no action could have been maintained against either the collector or the United States. *Welch* v. *Obispo Oil Co.,* 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502; *Williamsport Co.* v. *United States,* 277 U. S. 551.

The granting of the request for special assessment contained in the claim did not, we submit, increase the rights against the collector. The administrative relief was not granted because of an original wrongful collection, and the collector had no part in either the allowance of the administrative relief, or in the subsequent action, of which the respondent complains, of crediting part of the overpayment determined by the special method against taxes assessed for 1918. Cf. *Maas & Waldstein Co.* v. *United States,* 283 U. S. 583, 588; *Hammond-Knowlton, Administratrix* v. *Hartford Connecticut Trust Co., Executor,* 89 F. (2d) 175 (C. C. A. 2d), certiorari denied, 302 U. S. 707. Indeed, the theory of the court below upon the rehearing was not that the allowance of the original claim for refund gave the respondent any rights against the collector, or against the United States in the District Court, which would not have existed if the claim had been denied. Its latest holding was that, after the filing of the November 28, 1927, claim for 1917, there was a reopening and reconsideration of the original claim and then a final disallowance of that original claim. Under this view, therefore,

it is as if suit had been brought upon denial of a request for special assessment, and, as we have shown, the denial of such a request does not present a justiciable question.

C. The Petition Attempts to State a Cause of Action on an Allowed Claim for 1917, Which Is Not Within the Jurisdiction of the District Court

The court below, in its opinion handed down after the rehearing, treated the present suit, insofar as it relates to the year 1917, as one to recover that part of a claim for refund of a 1917 overpayment which had been disallowed (R. 78). In its earlier opinion, handed down on March 18, 1938, the court had reached a different conclusion and stated at the beginning of its opinion (R. 65) that the action was to recover part of an overpayment which had been allowed. That this was respondent's theory seems clear from the parts of its petition which we have heretofore quoted. We submit, however, that if this theory be adopted, nevertheless the District Court did not have jurisdiction.

The allowance of a claim, without more, does not import that there was an unlawful collection of a tax by a collector, for, as here, the allowance may be the result of special administrative relief granted by the Commissioner. The collector does not participate in allowing a claim, nor is he a party to the refusal to refund in cash. He can neither allow a refund nor draw money from the Treasury to pay it. Some participation by a collector in an unauthorized act is essential to hold

him liable personally, and some participation by him is likewise a jurisdictional prerequisite to suit in the District Court against the United States where recovery is sought of an amount in excess of $10,000 under Section 24 of the Judicial Code. *Moses et al., Executors* v. *United States,* 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743; *Hammond-Knowlton, Administratrix* v. *Hartford Connecticut Trust Co., Executor, supra; Otis Elevator Co.* v. *United States,* 18 F. Supp. 87 (S. D. N. Y.); *Gans Steamship Line* v. *United States,* 65 F. (2d) 1016 (C. C. A. 2d), certiorari denied, 290 U. S. 657; *First Nat. Bank* v. *United States,* 2 F. Supp. 107, 109 (E. D. Mo.); *Arthur C. Harvey Co.* v. *Malley,* 60 F. (2d) 97, 100 (C. C. A. 1st), affirmed on other grounds, 288 U. S. 415. Cf. *United States* v. *Savings Bank,* 104 U. S. 728, 734.

D. The Credit of the Allowed Overpayment for 1917 Against Taxes Assessed for 1918 Precludes Suit for the Year 1917

The petition (O. R. 1–3), as we have already seen, alleges that the Commissioner credited part of the overpayment determined for the year 1917 against taxes for the year 1918, and it is this part of the overpayment which is sought to be recovered. Actually, however, the only issue raised by the petition dealt with the year 1918—whether five waivers executed by the respondent were effective to extend the time for asessing the 1918 tax to July 3, 1926, the day it was actually assessed (O. R. 25). That question was ultimately decided against the Government.

Under such circumstances, we submit that the District Court has no jurisdiction of a suit for the year of original overpayment, and that the proper forum is the Court of Claims, in a suit on the year to which the overpayment was applied. This position is elaborated in the brief for the United States in No. 437, *United States* v. *Jaffray*, which is to be argued with the present case. Since that case involves credits against both barred and unbarred but erroneous deficiencies and contains a full discussion of the entire problem, we respectfully refer the Court to our brief in that case. If the position there taken as to credits against barred deficiencies is sound, the present case must be dismissed for lack of jurisdiction irrespective of the factors discussed in Parts A, B, and C, *supra*.

III

THE UNITED STATES HAS NOT WAIVED THE JURISDICTIONAL DEFECTS OF THE PETITION, NOR IS IT ESTOPPED TO RAISE THEM

The rule is well settled that the jurisdiction of a court may be questioned at any time in the course of the suit, or may be raised at any time by the court *sua sponte*. *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419–421; *Mansfield, C. & L. M. Ry. Co.* v. *Swan*, 111 U. S. 379, 381–386. Since the United States may be sued only upon its own terms, any jurisdictional fact prescribed by the statute is essential, and cannot be waived. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528; *United*

States v. *Felt & Tarrant Co.*, 283 U. S. 269, 272; *Dalle* v. *United States*, 289 U. S. 367, 372; *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 71; *United States* v. *Michel*, 282 U. S. 656, 659; *Rock Island R. R. Co.* v. *United States*, 254 U. S. 141, 143; *Finn* v. *United States*, 123 U. S. 227; *Arnson* v. *Murphy*, 115 U. S. 579, 584; *Cheatham* v. *United States*, 92 U. S. 85, 88–89; *Nichols* v. *United States*, 7 Wall. 122, 130; *John F. Jelke Co.* v. *Smietanka*, 86 F. (2d) 470 (C. C. A. 7th), certiorari denied, 300 U. S. 669; *United States* v. *Chicago Golf Club*, 84 F. (2d) 914 (C. C. A. 7th).*

Consequently, the failure to deny the allegations of the petition is completely irrelevant. Of course, no denial was necessary of the legal conclusion (O. R. 1) that the action was brought in the District Court of the District of Massachusetts, "said

---

* In *Tucker* v. *Alexander*, 275 U. S. 228, a stipulation was allowed to take the place of a full statement in the claim for refund of the grounds upon which refund was sought. See also *Howbert* v. *Penrose*, 38 F. (2d) 577 (C. C. A. 10th). That case has no application to jurisdictional defects which enlarge the liability of the United States beyond its consent, such as, in the present case, the failure to file timely refund claims (*United States* v. *Felt & Tarrant Co.*, 283 U. S. 269) or the failure to allege an illegal or erroneous collection (*Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1; *Moore Ice Cream Co.* v. *Rose*, 289 U. S. 373). The Act which directs the Attorney General and the District Attorney to represent the United States (Act of March 3, 1887, c. 359, 24 Stat. 506, cited in Brief in Opposition, p. 5), does not allow either of those officers, or anyone else, to enlarge the liability of the United States beyond that to which it has consented. *Finn* v. *United States*, 123 U. S. 227; *Tucker* v. *Alexander*, 275 U. S. 228, 231–232.

court having jurisdiction of the matters complained of * * *." Nor was a denial necessary of the conclusion in paragraph Fifth of the petition (O. R. 1) that "All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, * * *." The details are set out in the following paragraph (O. R. 2), and show affiramatively the jurisdictional defects. *Cf. KVOS, Inc.*, v. *Associated Press*, 299 U. S. 269, 277. Moreover, it is plainly beyond the power of the United States Attorney by any act on his part, to obviate the necessity for meeting the conditions upon which the United States has consented to be sued. *Munro* v. *United States*, 303 U. S. 36, 41; *Minnesota* v. *United States*, No. 73, decided January 3, 1939.

CONCLUSION

The judgment of the court below should be reversed, with directions to dismiss the case for lack of jurisdiction.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.
JAMES W. MORRIS,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.
CHARLES A. HORSKY,
Special Attorney.

JANUARY 1939.

APPENDIX

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or any law of Congress, * * * and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Revenue Act of October 3, 1917, c. 63, 40 Stat. 300:

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the

net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057:

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to

determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation

the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary.

In cases in which the tax is to be computed under this section, if the tax as computed without the benefit of this section is less than 50 per centum of the net income of the taxpayer, the installments shall in the first instance be computed upon the basis of such tax; but if the tax so computed is 50 per centum or more of the net income, the installments shall in the first instance be computed upon the basis of a tax equal to 50 per centum of the net income. In any case, the actual ratio when ascertained shall be used in determining the correct amount of the tax. If the correct amount of the tax when determined exceeds 50 per centum of the net income, any excess of the correct installments over the amounts actually paid shall on notice and demand be paid together with

interest at the rate of ½ of 1 per centum per month on such excess from the time the installment was due.

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 284. (a) Where there has been an overpayment of any income, war-profits, or excess-profits tax imposed by this Act, * * * the Revenue Act of 1917, * * * or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) * * *

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

* * * * *

SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, * * * until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, * * *. No such suit or proceeding shall be begun * * * after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

(U. S. C., Title 26, Sec. 1672.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST TAXPAYER.

A refund of any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) made

after the enactment of this Act, shall be considered erroneous—

(a) if made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) in the case of a claim filed within the proper time and disallowed by the Commissioner after the enactment of this Act, if the refund was made after the expiration of the period of limitation for filing suit, unless—

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the United States Board of Tax Appeals or the courts. (U. S. C., Title 26, Sec. 1674.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

SEC. 610. RECOVERY OF AMOUNTS ERRONEOUSLY REFUNDED.

(a) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) refund of which is erroneously made, within the meaning of section 608, after the enactment of this Act, may be recovered by suit brought in the name of the United States, but only if such suit is begun within two years after the making of such refund.

(b) Any portion of an internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) which has been erroneously refunded (if such refund would not be considered as erroneous under section 608) may be recovered by suit brought in the name of the United States, but only if such suit is begun before the expiration of two years after the making of such refund or before May 1, 1928, whichever date is later. (U. S. C., Title 26, Sec. 1646.)

U. S. GOVERNMENT PRINTING OFFICE: 1939

INDEX.

	Page
Statement	1–2
Argument	2–22
POINTS OF THE ARGUMENT:	
I. The petitioner herein, as respondent below, voluntarily submitted to the jurisdiction of the District Court, filed an answer in which it admitted all of the necessary jurisdictional facts and thereby waived any right to object to the jurisdiction of that Court	2–8
II. The Government's delay in raising the jurisdictional objection and the manner in which it has been raised and urged has imposed an unconscionable burden and great expense upon the respondent and upon the Courts	9–15
III. The respondent herein, as petitioner and appellee below has alleged and proved to the satisfaction of all of the Courts below both on hearing and rehearing that this is a suit timely brought upon the rejection of a proper claim for refund of the $34,555.68 as a 1917 tax	15–18
IV. The decision of the Circuit Court of Appeals is not in conflict with any of the decisions of this Court or those of any other Circuit Court of Appeals and the cases relied upon by the Government are clearly inapplicable	19–22
Conclusion	22–23

STATUTES CITED.

	Page
Section 250 (d) of the Revenue Act of 1921; 42 Stat. 265	2
Section 24 (20) of the Judicial Code, as amended, 28 U. S. C. 41 (20)	2
Section 24 (5) of the Judicial Code, as amended, 28 U. S. C. 41 (5)	4
Act of March 3, 1887, c. 359, p. 6; 24 Stat. 506	4
Section 3226 of the United States Revised Statutes	17

CASES CITED.

Guaranty Trust Company of New York v. United States, 304 U. S. —; 58 S. Ct. 785, 789	7
Howbert, Collector v. Penrose, 38 F. (2) 577, 581	6
Leather Manufacturers Nat. Bank v. Morgan, 117 U. S. 96; 6 S. Ct. 657, 662	14
Primos Chemical Company v. Fulton Steel Corporation (D. C. N. D. N. Y.) 254 Fed. 454, 458	5

CASES DISTINGUISHED.

Lowe Brothers Company v. United States, 304 U. S. 302; 58 S. Ct. 896, 898	8, 10, 19, 20
Moses v. United States (C. C. A. (2)) 61 F. (2) 791, certiorari denied 289 U. S. 743	10, 19
Routzahn v. Reeves Brothers, 59 F. (2) 915 (C. C. A. 6th), certiorari denied, 287 U. S. 650	10
United States v. Andrews, 302 U. S. 517	21
United States v. Garbutt Oil Company, 302 U. S. 528	21
United States v. Reeves Brothers, 83 F. (2) 121 (C. C. A.) 6th), certiorari denied, 299 U. S. 573	10
Williamsport Wire Rope Company v. United States, 277 U. S. 551; 48 S. Ct. 589	11, 20, 21

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,
v.
BERTELSEN & PETERSEN ENGINEERING COMPANY.

BRIEF FOR THE RESPONDENT

IN OPPOSITION TO THE ALLOWANCE OF A WRIT OF CERTIORARI.

STATEMENT.

The United States, as petitioner herein, prays for a writ of certiorari to review a judgment of the Circuit Court of Appeals for the First Circuit (R. Vol. I, pp. 75–79) entered on July 13, 1938, which affirmed a judgment (R. Vol. II, pp. 16–23), rendered by the United States District Court for the District of Massachusetts in favor of the respondent herein, petitioner appellee below. The amount of the judgment is $34,555.68 together with the statutory interest thereon; the decision of the Circuit Court of Appeals is reported in 98 F. (2d) 182; and that of the District Court in 14 F. Supp. 868.

The $34,555.68 represents a portion of an overpayment of the respondent's income, excess-profits and war-profit taxes for the taxable year 1917 which the Commissioner of Internal Revenue refused to refund, but wrongfully and illegally credited against an alleged deficiency of taxes for the year

1918. The credit was made (1) without any assessment and notice of the alleged tax liability for the year 1918 and (2) after the five year period of limitation for the assessment and collection of any such taxes for the year 1918, as extended by various waivers, had expired under the provisions of *Section* 250 (d) *of the Revenue Act of* 1921; 42 Stat. 265.

The suit was brought in the District Court under *Section* 24 (20) *of the Judicial Code, as amended,* 28 U. S. C. 41 (20), usually referred to as the "Tucker Act". The sum in controversy "exceeds $10,000.00" and the Collector of Internal Revenue to whom the 1917 taxes were paid was "not in office" at the time the suit was commenced.

The petition for a writ of certiorari is based solely on the ground (1) that the District Court did not have jurisdiction of the case under the Tucker Act, as amended, and (2) that the Circuit Court of Appeals erred in refusing to order dismissal of the suit on that ground.

The respondent herein respectively submits the following in opposition to the allowance of the petition for the writ of certiorari.

ARGUMENT.

Point I.

THE PETITIONER HEREIN, AS RESPONDENT BELOW, VOLUNTARILY SUBMITTED TO THE JURISDICTION OF THE DISTRICT COURT, FILED AN ANSWER IN WHICH IT ADMITTED ALL OF THE NECESSARY JURISDICTIONAL FACTS AND THEREBY WAIVED ANY RIGHT TO OBJECT TO THE JURISDICTION OF THAT COURT.

The "statement" in the petition for the writ of certiorari (pp. 2, 3) which purports to set forth the facts material to the question of jurisdiction as alleged in the original petition and admitted by the answer is grossly inaccurate, incomplete and misleading. The original petition specifically alleges (1) that the District Court did have jurisdiction of the case (2) that proper claims for refund had been filed and

rejected and (3) that all other jurisdictional action requisite to the suit had been duly taken. The Government's answer expressly admits all of these allegations.

The original petition in the District Court (R. Vol. I, pp. 1-3) contains the following jurisdictional averments:

> "Third. This action is brought against the United States of America in the United States District Court for the District of Massachusetts, *said Court having jurisdiction of the matters herein complained of by the petitioner.* (Italics supplied.)
>
> "Fourth. The said action is one to recover back Federal war profits taxes, excess-profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally collected from the said petitioner and is an action arising out of the laws of the United States providing for internal revenue.
>
> "Fifth. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of have been denied or rejected by the Commissioner of Internal Revenue.
>
> . . . . . .
>
> "Eighth. Wherefore the petitioner claims a refund of $34,555.68 for 1918, representing an amount within less than four years which has been taken out of the 1917 proposed refund and employed to pay the 1918 deficiency without having been assessed, hence claiming same as refund now for 1918 illegally paid, or requesting the said same amount for 1917 as never having been fully paid after allowance. The taxpayer claims further interest from June 1918 to date of allowance by this

Honorable Court on the said $34,555.68, approximating $22,000."

The government's answer (R. Vol. I, p. 3) was as follows:

"Comes now the respondent in the above-entitled action and for answer to the petition filed herein admits each and every allegation in paragraphs First to Eighth, inclusive, of the said petition, except any allegation or suggestion or implication in said paragraphs, or any of them, that the assessment of $34,555.68 for 1918 was not assessed or was assessed at any other time than in July, 1926. . . ."

It is fundamental that any suitor can submit himself to the jurisdiction of any Court which has jurisdiction over the subject matter of the suit. In the case at bar, it is clear that under the statute the District Court did have jurisdiction of the subject matter because this is a case arising under the laws providing for Internal Revenue. *Section 24 (5) of the Judicial Code, as amended,* 28 U. S. C. 41 (5) provides that the District Court shall have jurisdiction as follows:

"Fifth. Of all cases *arising under any law providing for internal revenue,* or from revenue from imports or tonnage except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. No. 563, par. 5, No. 629, par. 4; Mar. 3, 1911, c. 231, No. 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

Moreover the statute itself, Act of March 3, 1887, c. 359, page 6; 24 Stat. 506, authorizes and directs the Attorney General of the United States and the District Attorney upon whom a petition of this kind is filed to represent the Government and to file all of the necessary pleadings. The Statute provides:

"763. *Same; service; appearance by district attorney.* . . . It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises. Should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court."

Since the original petition in this case was filed and served in accordance with the requirements of the statute and the duly authorized officers of the Government have not only expressly admitted that the District Court did have jurisdiction of the case but have also admitted all of the necessary jurisdictional facts, we respectfully submit to this Honorable Court that the United States should be bound by those admissions just as any other defendant would be bound if he consented to the jurisdiction of any Court which is invested with jurisdiction over the subject matter.

In the case of *Primos Chemical Company* v. *Fulton Steel Corporation* (D. C. N. D. N. Y.) 254 Fed. 454, 458, the Court said:

"Questions of jurisdiction in the United States courts are not free from perplexities. . . .

. . . . . .

"There is such a thing as jurisdiction of the person

which can be given by consent of the defendant, he waiving his right to be sued in a given district, and there is such a thing as jurisdiction of the subject-matter of the suit, which cannot be conferred on any court by either assumption of jurisdiction or by consent of the parties, or of either or any of them, or by request of all the parties to the suit. *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62, 24 Sup. Ct. 598, 48 L. Ed. 820; *Mansfield, etc.* v. *Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Parker* v. *Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912, 35 L. Ed. 654."

In the case of *Howbert, Collector* v. *Penrose*, 38 F. (2) 577, 581, the Government based its jurisdictional objection upon the insufficiency of the claim for refund. It failed to plead the objection by its answer and did not raise it until it was too late for the taxpayer to remedy the defect. The Circuit Court of Appeals for the Tenth Circuit overruled the objection and said:

"If the defendant had challenged the sufficiency of the claim by his answer, the plaintiff had abundant time to supply the deficiency by a new or an amended claim. When the point was first raised at the trial in October, 1928, both periods of limitation had expired.

"The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant concedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc., R. Co.* v. *United States*, 254 U. S. 141, 41 S. Ct. 55, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is the substance should be given*

the right of way over form. Eisner v. *Macomber*, 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Bowers* v. *Kerbaugh-Empire Co.*, 271 U. S. 170, 46 S. Ct. 449, 70 L. Ed. 886.

"The claim for refund should have been more particular; *but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer.* The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

In the case of *Guaranty Trust Company of New York* v. *United States*, 304 U. S.—; 58 S. Ct. 785, 789 (decided April 25, 1938) this Court held that when a foreign Government or the Government of the United States voluntarily appears in the District Court, as has been done here by the Government's answer, such government thereby abandons its sovereign immunity and cannot thereafter object on the ground that the District Court did not have jurisdiction. Mr. Justice Stone said:

"By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act. *United States* v. *The Thekla*, 266 U. S. 328, 340, 341, 45 S. Ct. 112, 113, 69 L. Ed. 313; *United States* v. *Stinson*, 197 U. S. 200, 205, 25 S. Ct. 426, 49 L. Ed. 724; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individ-

> uals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts."

In the case of *Lowe Brothers Company* v. *United States*, 304 U. S. 302; 58 S. Ct. 896, 898, on which the Government strongly relies in the case at bar, Mr. Justice Stone said:

> ". . . The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the Collector whenever the amount claimed exceeds $10,000 and the Collector is out of office. This is made evident by the words of the amendment which authorize the substitution only when the collection is made by the collector when in office.

Inasmuch as a suit of this kind is a substitution for the common law or personal action against the Collector, it would seem clear that the United States can submit to the jurisdiction of the District Court just as any other ordinary litigant could submit to the jurisdiction of any Court which had jurisdiction over the subject matter.

The respondent respectfully submits to this Honorable Court, therefore (1) that the District Court did have jurisdiction, (2) that the Courts below did not err in entertaining and hearing the suit (3) that the government has by its answer waived any right to object to the jurisdiction of the District Court and (4) that the petition for the writ of certiorari should be denied on those grounds.

Point II.

THE GOVERNMENT'S DELAY IN RAISING THE JURISDICTIONAL OBJECTION AND THE MANNER IN WHICH IT HAS BEEN RAISED AND URGED HAS IMPOSED AN UNCONSCIONABLE BURDEN AND GREAT EXPENSE UPON THE RESPONDENT AND UPON THE COURTS.

The original petition in the suit was filed September 19, 1929 (R. Vol. I, p. 1) and the government's answer expressly admitting that the District Court did have jurisdiction of the case and also admitting all the necessary jurisdictional facts was filed on October 21, 1929 (R. Vol. I, p. 3). Upon these pleadings all of the evidence was submitted and the case was heard, argued and decided twice in the District Court and once in the Circuit Court of Appeals before the Government made any attempts whatsoever to disregard and repudiate the admission in its answer or to object to the jurisdiction of the District Court. It was not until February 18, 1937, when the Government filed its assignment of error at the second hearing in the Court of Appeals that any such objection was ever raised. The seventh assignment of error (R. Vol. II, p. 62) reads as follows:

> "VII. That the Court erred by assuming jurisdiction to try and determine the controversy between the plaintiff and the defendant herein."

Either purposeful or otherwise, the government's objection to the jurisdiction of the District Court was delayed or concealed throughout all of the intervening years between 1929 and 1937. Obviously the appellee was taken completely by surprise. From the very beginning the respondent, as petitioner below, was misled and deceived by the jurisdictional admissions in the government's answer which it relied upon in good faith. The objection has never been clearly stated and set forth by an amendment to the answer,

by motion or by any other form of pleading. In all of the unpleaded and dilatory attacks upon the jurisdiction of the District Court, the Government has constantly shifted its position and has attempted to impute to the respondent the bringing of first one form of action and then another while the real form of the action and the real nature of the appellee's claim as set forth in the petition are entirely disregarded and the admissions in its own answer are coldly ignored and repudiated.

When the case was argued in the Circuit Court of Appeals on the foregoing assignment of error, the objection was based solely on the ground that the respondent, petitioner below, was seeking recovery of the $34,555.68 as a "1918 tax" and that the District Court did not have jurisdiction of the case because the 1918 tax had been collected by way of the credit by the Commissioner of Internal Revenue. This contention was based upon the cases of *United States* v. *Reeves Brothers*, 83 F. (2) 121 (C. C. A. 6th) certiorari denied 299 U. S. 573 and *Routzahn* v. *Reeves Brothers*, 59 F. (2) 915 (C. C. A. 6th) certiorari denied 287 U. S. 650.

The Circuit Court of Appeals overruled that objection and held (R. Vol. II, p. 65) that in the last analysis the suit was for a balance of an overpayment of the 1917 tax and not for an illegal collection of the 1918 tax.

Counsel for the Government construed the foregoing language of the Circuit Court to mean that the case had been decided on the theory that this is an action on an account stated or that it was based on an implied promise of the Government to pay. Thus, at the rehearing the Government insisted that since the suit was based on the certificate of overassessment or the implied promise of the government the District Court did not have jurisdiction under the decisions of *Moses* v. *United States*, C. C. A. (2) 61 F. (2) 791, certiorari denied, 289 U. S. 743 and *Lowe Brothers Company* v. *United States*, 304 U. S. 302. The Circuit Court

of Appeals also overruled this objection (R. Vol. II, p. 76) and in the course of its opinion said:

> "That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund.
>
> . . . . . .
>
> ". . . and on November 28, 1927, the taxpayer renewed its claim for a refund of $34,555.68 as an overpayment of its 1917 tax by filing with the Commissioner of Internal Revenue a specific claim for the amount under Sec. 3226 R. S. as amended by Sec. 1113 of the Revenue Act of 1926, to which claim the suit of the taxpayer relates, the receipt of which claim was acknowledged by the Commissioner.
>
> "On February 6, 1928, the Commissioner of Internal Revenue notified the taxpayer by letter that its claim of November 28, 1927, had been examined and would be rejected, which rejection would appear on the next schedule approved by the Commissioner. . . ."

In the petition for certiorari the Government is attempting to make it appear (1) that this suit is based upon the refusal of the Commissioner to grant a special assessment claim such as this Court held could not be made the basis of a suit in the case of *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551; 48 S. Ct. 589 and (2) that the claim for refund upon which the suit is based was filed out of time

and based on a different ground from the original claim for refund.

As to the first of these contentions, the petition (p. 7) states:

> ". . . A further fatal objection to the approach taken by the court below lies in the fact, overlooked by that court, that the overassessment for 1917 results from a special assessment pursuant to Sections 210 and 328 of the Revenue Acts of 1917 and 1918 (O. R. 32, 37; R. 44, 52, 57–58). No action in any court could, therefore, have been predicated upon the rejection of the original claim. *Welch* v. *Obispo Oil Co.*, 301 U. S. 190; *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Williamsport Co.* v. *United States*, 277 U. S. 551. Consequently, if it be true that the 1927 claim for refund was a 'reopening' of the original claim, the essence of the 1927 claim would be for special assessment relief. . . ."

It is true that the petitioner filed an application for special assessment under Section 210 of the Act. But, it also filed timely and proper claim for refund of $121,715.09 on account of its 1917 tax. With respect to this first claim the Commissioner's letter (R. Vol. I, p. 32) states that the respondent would be entitled to a refund of $91,570.34 by the method of special assessment and with respect to the claim for refund the same letter states as follows:

> "In accordance with the above conclusions, your claims for the refund of $46,715.09 and $75,000.00, aggregating $121,715.09, will be rejected for $30,144.75."

Upon receipt of the foregoing letter of the Commissioner the respondent immediately objected to the application of the $34,555.68 which was credited against the 1918 tax and on November 28, 1927, filed two claims for refund each for $34,555.68, one for the year 1917 and the other for the year

1918 (R. Vol. I, p. 38). With respect to this claim for refund for the year 1917 and the memorandum of the Special Advisory Committee which was signed by the Commissioner of Internal Revenue and furnished to the respondent the Circuit Court makes special comment (R. Vol. II, p. 76). This memorandum stated in part as follows:

> "On November 28, 1927, the taxpayer filed with the Collector of Internal Revenue for its district claims for refund for 1917 and 1918 each for $34,555.68 on the grounds that interest had been erroneously computed and that the additional tax for 1918 had never been assessed but was used as an offset against the overassessment for 1917 after the period of limitation for making assessments as extended by waiver had expired. *The claims were considered on the merits and in Bureau letter dated February 6, 1928, they were proposed for rejection.* The official rejection appeared on schedule No. 11471 dated February 28, 1928. Within two years from the disallowance of said claims, namely, on or about August 28, 1929, a petition was filed with the United States District Court for the District of Massachusetts for the recovery of $34,555.68 and interest thereon which amount was alleged to have been erroneously and illegally withheld (this allegation applies to 1917) or erroneously and illegally collected (this allegation applies to 1918) from the petition." (Italics supplied.)

Notwithstanding all of these obvious facts which are apparent in the record and the government's admissions in its answer to the effect that proper claims for refund had been filed, the petition filed in this Court (Pet. p. 7) states as follows:

> "The claim alleged to have been filed in 1927 for the

refund of the 1917 taxes is not in the record, nor do the facts stated therein show that it was in any true sense an amendment to the original claim. Respondent, consequently even fails to show that it has complied with Section 284 (b) (1) of the Revenue Act of 1926, requiring the filing of claims within four years after the payment of the tax. Cf. *United States* v. *Chicago Golf Club,* 84 F. (2d) 914 (C. C. A. 7th); *Rock Island &c., R. R.* v. *United States,* 254 U. S. 141, 142–143."

It is obvious that all of the grounds upon which the Government bases its jurisdictional objection are matters of fact which could have been set up by way of special defenses in its answer and that fair pleading and good conscience required the Government to do so. On this aspect of the case the attention of this Honorable Court is respectfully invited to the language of Mr. Justice Harlan in the case of *Leather Manufacturers Nat. Bank* v. *Morgan,* 117 U. S. 96; 6 S. Ct. 657, 662, where in defining and invoking the doctrine of estoppel he said:

"These cases are referred to for the purpose of showing some of the circumstances under which the courts, to promote the ends of justice, have sustained the general principle that where a duty is cast upon a person, by the usages of business or otherwise, to disclose the truth,—which he has the means, by ordinary diligence, of ascertaining,—and he neglects or omits to discharge that duty, whereby another is misled in the very transaction to which the duty relates, he will not be permitted, to the injury of the one misled, to question the construction rationally placed by the latter upon his conduct. This principle commends itself to our judgment as both just and beneficient; for, as observed by the Supreme Court of *Ohio in Ellis* v. *Ohio Life Ins. & T. Co.,* 4 Ohio St. 667, while in the forum of conscience there may be a

wide difference between intentional injuries and those arising from negligence, yet no man conducts himself 'quite as absolutely in this world as though he was the only man in it; and the very existence of society depends upon compelling every one to pay a proper regard for the rights and interests of others. The law, therefore, proceeding upon the soundest principles of morality and public policy, has adapted a large number of its rules and remedies to the enforcement of this duty'.". . .

Notwithstanding the fact that the objection is jurisdictional in its nature, we respectfully submit that the doctrine as above outlined should be invoked and applied in the case at bar.

Point III.

THE RESPONDENT HEREIN AS PETITIONER AND APPELLEE BELOW HAS ALLEGED AND PROVED TO THE SATISFACTION OF ALL OF THE COURTS BELOW BOTH ON HEARING AND REHEARING THAT THIS IS A SUIT TIMELY BROUGHT UPON THE REJECTION OF A PROPER CLAIM FOR REFUND OF THE $34,555.68 AS A 1917 TAX.

When the respondent filed its original petition, it alleged that it was seeking to recover the $34,555.68 either as a 1917 tax or as a 1918 tax because of the uncertainty which then existed as to the real status of that sum. However, the respondent, as petitioner and appellee below, has throughout all of the hearings and in all of the Courts relied upon its right to recover the $34,555.68 as an overpayment or wrongful collection of the "1917 tax", which the Commissioner of Internal Revenue has refused to refund, and has considered the allegations of the petition with respect to taxes for the year 1918 as purely precautionary.

In the first opinion of the District Court (R. Vol. I, p. 40) Judge Brewster found and ruled as follows:

"In its petition and amended petition the petitioner

seeks to recover (a) the balance of an overpayment of 1917 income and profits tax, and (b) an additional sum claimed to be due for interest."

In the first opinion of the Circuit Court of Appeals (R. Vol. II, p. 4) Judge Morton said:

> "This is an action to recover $34,555.68 with interest, constituting part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the District Court (R. Vol. II, p. 16) Judge Sweeney found and ruled as follows:

> "This is an action at law to recover $34,555.68, with interest, constituting a part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the Circuit Court of Appeals (R. Vol. II, p. 65) Judge Wilson said:

> "This is an action by a taxpayer to recover the sum of $34,555.68 with interest as a part of an overpayment of $91,570.34 for income and excess profits taxes for the year 1917, which overpayment had been allowed by the Commissioner.
>
> . . . . . .
>
> ". . . we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax."

In the third opinion of the Circuit Court of Appeals (R. Vol. II, pp. 77, 78) Judge Wilson said:

> "The government having admitted all the jurisdictional facts except those authorizing the District Court to hear such a case, the facts appearing in the record demonstrate that the suit was one which could have been

brought against a Collector, if living, but who is now dead or out of office.

. . . . . .

"Upon a reconsideration of the facts and the briefs on rehearing, we think this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918."

The facts upon which the foregoing findings or rulings of all of the Courts below are based, briefly stated are as follows:

The defendant's answer clearly admits the timely filing of proper claims for refund whether the $34,555.68 be considered as a 1917 tax or as a 1918 tax. Throughout all of the arguments, however, and up to the time of the second hearing, in the Circuit Court of Appeals, all of the parties had considered the case from the viewpoint of the plaintiff's right to recover that sum as a 1917 tax.

It is thus clear that the rejection of this claim for 1917 on February 28, 1928, constituted the rejection of that part of the first claim to which this suit or proceeding relates and falls squarely within the language of *Section* 3226 *of the United States Revised Statutes* which provides as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . . No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two

> years after the disallowance of the part of such claim to which such suit or proceeding relates. . . ."

The Circuit Court of Appeals on this point (R. Vol. II, pp. 77, 78) said:

> "We think the contention of the taxpayer must be sustained, viz: that the filing of the second claim for refund on November 28, 1927, and its consideration on its merits was a reopening of the original claim of refund which had been timely filed under Sec. 3226 R. S. (amended by Sec. 1113 of the 1926 Revenue Act); *Jones* v. *United States, supra,* page 152; *Southwestern Oil & Gas Company* v. *United States, supra,* page 406; that the Commissioner accepted the claim as such without any objection as to its timeliness or form and considered it on its merits and officially denied it on February 28, 1928, and the suit of the taxpayer was filed within two years, or on September 19, 1929. . . ."

It is respectfully submitted, therefore, that all of the grounds upon which the government bases its jurisdictional objection are untenable since the petitioner has alleged and proved to the satisfaction of all of the Courts below both on hearing and on rehearing that this is a suit timely brought upon the rejection of a proper claim for refund of the $34,555.68 as a 1917 tax which is the same kind of a suit which could have been brought against the Collector of Internal Revenue if he had been in office at the time the suit was commenced.

Point IV.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH ANY OF THE DECISIONS OF THIS COURT OR THOSE OF ANY OTHER CIRCUIT COURT OF APPEALS AND THE CASES RELIED UPON BY THE GOVERNMENT ARE CLEARLY INAPPLICABLE.

When the Government first raised the question of jurisdiction in its argument in the Circuit Court of Appeals, it relied chiefly upon the case of *Moses* v. *United States*, 60 F. (2) 791 (C. C. A. (2)); certiorari denied 299 U. S. 743, which was a suit on an allowed claim. As to this case it is respectfully submitted that the findings and holdings of all of the Courts, as has been stated above, clearly show that the Moses case is not applicable to the situation presented in the case at bar. In its opinion (R. Vol. II, p. 76) the Circuit Court of Appeals said:

> "It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. *Goodrich, Admr.* v. *Coffin*, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917 and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918."

The case of *Lowe Brothers Company, supra*, which was forcefully argued and relied upon by the Government at the rehearing was clearly distinguished from the case at bar by the Circuit Court of Appeals (R. Vol. II, p. 78) when it said:

"The case of *Lowe Bros.* v. *United States*, 92 F. (2d) 905 affirmed by the Supreme Court on May 16, 1938, does not militate against the taxpayer's right of recover in this case, since the tax for the year in question in that case was not collected by a collector who was dead or out of office, as the 1917 tax had been in this case, but was in effect collected by the Commissioner of Internal Revenue by applying an overpayment as a credit on taxes for a prior year, which the Commissioner attempted to do in this case for an alleged deficiency tax for 1918."

The case of *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551, 48 S. Ct. 587 was not relied upon by the Government in either of the hearings before the Circuit Court of Appeals on the jurisdictional question. In the petition for certiorari, however, that seems to be the case upon which the Government most strongly relies. That case is clearly distinguishable from the case at bar in three outstanding respects.

First: In that case the taxpayer based its right to sue in the Court of Claims *upon the Commissioner's refusal to grant special assessment.* In the case at bar the Commissioner did not refuse to grant special assessment but he refused to refund a portion of the amount allowable either on the application or on a proper claim for refund which was equal to the amount which he found was also allowable by way of special assessment under *Section* 210 *of the Act of October* 3, 1917.

Second: In that case it does not appear that the taxpayer filed any claim for refund whatsoever which would bring the suit within the requirements of *Section* 3226 *of the United States Revised Statutes.*

Third: Even if the question of special assessment had

any bearing on the case it is clear that here special assessment was allowed and the Commissioner of Internal Revenue refused to pay over or refund the amount of overpayment thus determined while in the *Williamsport Wire Rope Company case, supra,* the Commissioner refused even to allow special assessment.

The cases of *United States* v. *Garbutt Oil Company,* 302 U.S. 528 and *United States* v. *Andrews,* 302 U.S. 517 were not cited in the briefs or relied upon in any of the arguments urged in the Circuit Court of Appeals. But, in the petition for the writ of certiorari (p. 8) the government makes the following statement:

> "Nor can the respondent sustain jurisdiction if the so-called renewal claim were based upon different grounds than those specified in the original claim. Apart from the wholly hypothetical basis upon which such a claim of jurisdiction is founded, it is plain that a renewal claim upon different grounds would be ineffective. In *United States* v. *Garbutt Oil Co.,* 302 U.S. 528, and *United States* v. *Andrews,* 302 U.S. 517, this Court held that claims for refund based upon specific grounds may not properly be amended after the running of the statute of limitations to include new and different grounds. Nor is the result changed where the Commissioner passes on the amended claim on the merits, since he has no power to waive the statute of limitations. *United States* v. *Garbutt Oil Co., supra,* at page 534.

There is nothing in the record to sustain the foregoing statement of the Government. Neither of the claims was put in evidence because the Government expressly admitted by its answer that proper and timely claims for refund had been filed. The question of the grounds upon which a claim for refund is based is a question of fact and the best evidence

of that fact is the document themselves. It is clear, however, from this record, as has been stated above, that the Commissioner of Internal Revenue regarded the claims for refund as timely and proper and considered them on their merits. Under these circumstances it is clear that the government is again precluded under the doctrine of equitable estoppel.

CONCLUSION.

The decision of the Circuit Court of Appeals is not in conflict with any decision of this Court or with those of any other Circuit Court of Appeals. The case does not involve any questions of great public interest and concern which have not already been settled by the decisions of this Court. The United States has not been prejudiced in any manner by reason of the fact that the respondent's claim has been heard and determined in the District Court instead of in the Court of Claims. The whole case has been carefully considered in two decisions of the District Court and in three decisions of the United States Circuit Court of Appeals. The original petition contained all of the necessary jurisdictional averments which were specifically admitted by the government's answer. Throughout the entire presentation of its case in the District Court the respondent, as petitioner below, relied upon those admissions in good faith. Even though the government's objecton is asserted to be jurisdictional in its nature it is based entirely upon facts which could have been alleged and proved or disproved. The Government itself concedes that the respondent was entitled to judgment on the real merits of the case. Under these circumstances it would work a great and unconscionable injustice upon the respondent if the government at this late date should be permitted to repudiate and disregard its own admissions.

Wherefore the respondent respectfully submits to this Honorable Court (1) that the District Court did have juris-

diction of the case (2) that the Circuit Court of Appeals did not err in refusing to dismiss the petition and (3) that the petition for a writ of certiorari should be denied by this Honorable Court.

Respectfully submitted,

O. WALKER TAYLOR,
RAY HENRY,
Attorneys for the Respondent.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 31 1939
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 416.

UNITED STATES OF AMERICA,
Petitioner,

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE RESPONDENT.

O. WALKER TAYLOR,
RAY HENRY,
Counsel for Respondent.

L. H. LANE, Law Printer, 211 High Street, Boston.

INDEX OF TOPICS.

	Page
Jurisdiction of this Court	1
Opinions of the Courts below	1
Statement of the case	2
The Statutes Involved	3
Issues Involved	4
Argument	5
General Statement	5
I. The Circuit Court of Appeals did not err in holding that at the time the original petition in this suit was filed, the same kind of a suit or the same form of action could have been brought and maintained against the Collector of Internal Revenue, to whom the respondent paid its taxes for the year 1917 . . .	9
First: Upon the allegations of the petition, it is clear that the suit was properly brought to recover the $34,555.68 as a 1917 tax wrongfully collected by the Collector of Internal Revenue .	9
Second: The District Court has twice found or ruled that this is a suit for the recovery of taxes for the year 1917 and the Circuit Court of Appeals has three times sustained those findings or rulings	12
Third: This suit is not an action on an account stated nor is it based on an allowed claim	14
II. The Circuit Court of Appeals did not err in holding that the respondent filed a timely and	

Page

proper claim for refund for the year 1917 and brought the suit within two years thereafter as required by Section 3228 and Section 3226 of the United States Revised Statutes, respectively 18

First: As a matter of fact the respondent filed proper and timely claims for refund for the year 1917 . . . 19

Second: As a matter of law the respondent, as petitioner below, fully complied with the statutes in so far as the allegations of the petition and the claims for refund are concerned . . . 22

Third: This suit is not based on a special assessment claim or the Commissioner's refusal to grant special assessment under Section 210 of the Revenue Act of 1917 . . . 25

Fourth: The claim for refund for the year 1917 filed on November 28, 1927, was not a new claim nor was it based on different grounds from those stated in the original timely claim . 30

III. This Court should not hold and rule that whenever a Collector of Internal Revenue makes a wrongful and excessive collection of a tax for one year the Commissioner of Internal Revenue wrongfully credits that sum against an outlawed tax for another year, without the taxpayer's consent, then and in that event the taxpayer's only remedy is a suit for such sum as a tax for the year to which the credit is made 35

Page

IV. As a matter of law, equity and good conscience, the Government waived the right to raise its so-called jurisdictional objection in the Appellate Courts by virtue of the fact that it appeared, pleaded and expressly admitted all of the facts necessary to sustain the jurisdiction of the District Court 40

Conclusion 48

Appendix 50

CASES CITED.

Bates Manufacturing Co. v. United States, 303 U. S. 567; 58 S. Ct. 684 39

Christie-Street Commission Co. v. United States, 136 F. 326, 329–330 37

Daube v. United States, 289 U. S. 367; 53 S. Ct. 597 . 17

Dickerson v. Colgrove, 100 U. S. 578, 580; 25 L. Ed. 618, 44

Factors & Finance Company v. United States (Ct. Cl.) 56 Fed. (2d) 902, affirmed, 288 U. S. 289; 53 S. Ct. 287 . 27

Guaranty Trust Company of New York v. United States, 304 U. S. 126; 58 S. Ct. 785 46

Hickman v. United States (D. C.) 47 F. (2d) 328 . . 32

Howbert, Collector v. Penrose, 38 F. (2d) 577, 581 . . 42

Jones v. United States, 5 F. Supp 146, 152 . . . 32

McKesson & Robbins, Inc. v. Edwards (C. C. A.), 57 F. (2d) 147 32

Mobile Drug Co. v. United States (D. C.), 39 F. (2d) 940 . 32

Moses v. United States (C. C. A. 2nd) 61 F. (2d) 791; certiorari denied 289 U. S. 743; 53 S. Ct. 689 . . 7

Naumkeag Steam Cotton Co. v. United States, 2 Fed. Supp. 126, 133 44

Page

Pacific Mills v. Nichols, 72 Fed. (2d) 103, 107 . . 32
Primos Chemical Company v. Fulton Steel Corporation, 254 Fed. 454, 458 42
Retzer v. Wood, 109 U. S. 185; 3 S. Ct. 164 . . 24
Ridgeway v. United States, 18 Ct. Cl. 707; 4 A. F. T. R. 4915, 4918–4919 30
Southwestern Oil & Gas Company v. United States, 29 Fed. (2d) 404, 406, certiorari denied 280 U. S. 601 . . 32
Tucker v. Alexander, 275 U. S. 228; 48 S. Ct. 45, 46 . 43
United States v. Emery, Bird, Thayer, Realty Company, 237 U. S. 28; 35 S. Ct. 499 38
United States v. Hvoslef et al., 237 U. S. 1; 35 S. Ct. 459, 462 45
United States v. Memphis Cotton Oil Co., 288 U. S. 62; 53 S. Ct. 278 32
Upton v. McLaughlin, 105 U. S. 640; 26 L. Ed. 1199 . 24
Western Wheel Scraper Company v. United States, 72 Fed. (2d) 487 23

CASES DISTINGUISHED.

Ford Motor Company v. United States (Ct. Cl.), 3 F. Supp. 423 32
Lowe Brothers Company v. United States (C. C. A. 6th) 92 F. (2d) 905, affirmed 304 U. S. 302; 58 S. Ct. 896 . 5, 7, 13, 18, 47
Reeves Brothers Company v. United States (C. C. A. 6th) 83 F. (2d) 121; certiorari denied 299 U. S. 573; 57 S. Ct. 37 7
United States v. Andrews, 302 U. S. 517; 58 S. Ct. 315, 8, 33, 34
United States v. Garbutt Oil, 302 U. S. 528; 58 S. Ct. 320, 8, 33, 34
United States v. Jaffray et al., 97 F. (2d) 488 . . . 36
Williamsport Wire Rope Company v. United States, 277 U. S. 551; 48 S. Ct. 587 . . . . . 7, 26, 29

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

No. 416.

UNITED STATES OF AMERICA, PETITIONER,
v.
BERTELSEN & PETERSEN ENGINEERING COMPANY.

BRIEF FOR THE RESPONDENT.

JURISDICTION OF THIS COURT.

This case is before this Court on a petition for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit which affirmed a decision of the United States District Court for the District of Massachusetts in favor of the respondent. The petition was timely filed under *Section* 240 (a) *of the Judicial Code, as amended* and was granted on November 21, 1938. The sole ground upon which the petition is based is the contention (1) that the District Court did not have jurisdiction of the case and (2) that the Circuit Court of Appeals erred in affirming the decision of that Court.

OPINIONS OF THE COURTS BELOW.

The various opinions of the courts below are reported as follows:

Opinion of the District Court, Brewster, J. (R. Vol. I, pp. 40-45) ordering judgment for petitioner, respondent herein, for $44.07; reported in 49 F. (2d) 395;

Opinion of the Circuit Court of Appeals, Morton, J. (R. Vol. II, pp. 4–9) vacating judgment of the District Court and remanding case for further proceedings; reported in 60 F. (2d) 745;

Opinion of the District Court, Sweeney, J. (R. Vol. II, pp. 16–23) ordering judgment for petitioner, respondent herein, for $34,555.68 with interest; reported in 14 F. Supp. 868;

Opinion of the Circuit Court of Appeals, Wilson, J. (R. Vol. II, pp. 65–68) affirming judgment of the District Court; reported in 95 F. (2d) 867; and

Opinion of the Circuit Court of Appeals on Rehearing, Wilson J. (R. Vol. II, pp. 75–78) reaffirming judgment of the District Court; reported in 98 F. (2d) 132.

STATEMENT OF THE CASE.

This suit was brought by the respondent, as petitioner below, in the United States District Court for the District of Massachusetts under *Section* 24 (20) *of the Judicial Code as amended by the Act of* February 24, 1925; c. 309, 43 Stat. 972; 28 U. S. C. 41 (20), sometimes referred to as *"The Tucker Act"*

The purpose of the suit was and is to recover the sum of $34,555.68 which was wrongfully and illegally collected by the Collector of Internal Revenue at Boston, Massachusetts, on account of the respondent's income, excess-profits and war-profits taxes for the year 1917 and wrongfully and illegally credited by the Collector or the Commissioner of Internal Revenue against taxes alleged to be due from the respondent for the year 1918. No notice was given the respondent and no assessment of the alleged tax liability for the year 1918 was made until after the assessment and collection of any such taxes for the year 1918 were barred by the applicable statutes of limitation and such credits are expressly declared to be "void" by *Section* 609 *of the Revenue Act of* 1928 (p. 54, *infra*). The Commissioner of In-

ternal Revenue disallowed the respondent's claim for refund which had been timely filed for the year 1917, to the extent of the $34,555.68, on the sole ground that the credit of that sum against the alleged underpayment or deficiency of the respondent's taxes for the year 1918 had been made within the applicable period of limitation, as extended by waivers (R. Vol. II, p. 16).

The original petition in the suit was filed on September 19, 1929 (R. Vol. I, p. 1) and contains specific allegations to the effect that, before the suit was brought, (1) timely and proper claims for refund had been filed, both with respect to the year 1917 and the year 1918, as required by *Section* 3228 *of the United States Revised Statutes* (p. 52, *infra*), (2) that the suit was begun within two years after "the disallowance of the part of the claim ($34,555.68) to which such suit or proceeding relates", as required by *Section* 3226 *of the United States Revised Statutes* (p. 52, *infra*), and (3) that all "other action requisite to this suit have been duly made and filed in due season".

The fact of the wrongful and illegal collection of the $34,555.68 was clearly established and evidenced at the trial (1) by the admissions of the Government in open Court (2) by an official Certificate of Overassessment (R. Vol. I, pp. 23–24) which has never been impeached by the Commissioner of Internal Revenue and (3) by other evidence which appears in the record or which could have been offered in evidence if the Government had not admitted all of the facts necessary to sustain the jurisdiction of the District Court.

THE STATUTES INVOLVED.

The statutes involved, the pertinent parts of which are either set forth in the argument below or in the appendix hereto, are as follows:

Act of March 3, 1887, c. 359, 24 Stat. 506,
Section 5; 28 U. S. C. 762.
Section 6; 28 U. S. C. 763.

United States Judicial Code, as amended,
Section 24 (5); 25 U. S. C. 41 (5); 36 Stat. 1092.
Section 24 (20); 28 U. S. C. 41 (20); 43 Stat. 972.

United States Revised Statutes, as amended,
Section 3226; 26 U. S. C. 156.
Section 3228; 26 U. S. C. 157.

Revenue Act of 1921, 42 Stat. 227,
Section 250 (d)

Revenue Act of 1924, 43 Stat. 253,
Section 277 (a) (2).
Section 278 (c).

Revenue Act of 1928, 45 Stat. 874,
Section 607; 26 U. S. C. 1670.
Section 609; 26 U. S. C. 1675.

THE ISSUES INVOLVED.

The Government's appeal to this Court raises the following issues:

I. WHETHER THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT AT THE TIME THE ORIGINAL PETITION IN THIS SUIT WAS FILED, THE SAME KIND OF A SUIT OR THE SAME FORM OF ACTION COULD HAVE BEEN BROUGHT AND MAINTAINED AGAINST THE COLLECTOR OF INTERNAL REVENUE, TO WHOM THE RESPONDENT PAID ITS TAXES FOR THE YEAR 1917.

II. WHETHER THE CIRCUIT COURT OF APPEALS ERRED IN HOLDING THAT THE RESPONDENT FILED A TIMELY AND PROPER CLAIM FOR REFUND FOR THE YEAR 1917 AND BROUGHT THE SUIT WITHIN TWO YEARS THEREAFTER, AS REQUIRED BY SEC-

TION 3228 AND SECTION 3226 OF THE UNITED STATES REVISED STATUTES, RESPECTIVELY.

III. WHETHER THIS COURT SHOULD HOLD AND RULE THAT WHENEVER A COLLECTOR OF INTERNAL REVENUE MAKES A WRONGFUL AND EXCESSIVE COLLECTION OF A TAX FOR ONE YEAR AND THE COMMISSIONER OF INTERNAL REVENUE WRONGFULLY CREDITS THAT SUM AGAINST AN OUTLAWED TAX FOR ANOTHER YEAR, WITHOUT THE TAXPAYER'S CONSENT, THEN AND IN THAT EVENT THE TAXPAYER'S ONLY REMEDY IS A SUIT FOR SUCH SUM AS A TAX FOR THE YEAR TO WHICH THE CREDIT IS MADE.

IV. WHETHER, AS A MATTER OF LAW, EQUITY AND GOOD CONSCIENCE, THE GOVERNMENT WAIVED THE RIGHT TO RAISE ITS SO-CALLED JURISDICTIONAL OBJECTION IN THE APPELLATE COURTS BY VIRTUE OF THE FACT THAT IT APPEARED, PLEADED, AND EXPRESSLY ADMITTED ALL OF THE FACTS NECESSARY TO SUSTAIN THE JURISDICTION OF THE DISTRICT COURT.

ARGUMENT.

GENERAL STATEMENT.

Obviously, the Government's whole objection to the jurisdiction of the District Court is based upon the interpretation put upon *Section* 24 (20) *of the Judicial Code, as amended, supra,* by this Court in the recent decision of *Lowe Brothers Company* v. *United States,* 304 U. S. 302; 58 S. Ct. 897 and some of the recent decisions of the various Circuit Courts of Appeal. Under these decisions it is contended that the Court of Claims had exclusive jurisdiction of this suit. The objection was never pleaded and the question was raised for the first time at the second hearing in the Circuit Court of Appeals. On the contrary, the Government's answer (R. Vol. I, p. 3) *expressly admits the jurisdiction of the District Court and all of the necessary jurisdictional facts as alleged in the petition* (R. Vol. I, pp. 1–3).

Either purposeful or otherwise, it was not until February 18, 1937, when the "Defendant's Assignment of Errors" (R. Vol. II, p. 62) was filed at the second hearing before the Circuit Court of Appeals that any such objection was raised. At that time the six-year period of limitation for bringing a suit in the Court of Claims had expired. It is not enough to say that the respondent was thus taken completely by surprise. The respondent was completely misled, deceived by the admissions contained in the Government's answer, by other admissions made in open court, and by its assent to the bill of exceptions which states (R. Vol. II, p. 13) that "*all requisite conditions precedent to the bringing of its petition were complied with by the petitioner*".

A careful analysis of the various grounds upon which the Government bases its so-called jurisdictional objection will reveal that all of them are matters of fact which could have been set forth by an amendment to its answer, a demurrer, a motion to dismiss or some other appropriate pleading. None of them tend to show that the District Court did not have inherent jurisdiction of the subject matter of the suit. All of them are in their nature susceptible of proof or disproof.

Moreover, in all of these unpleaded, dilatory and piecemeal attacks upon the jurisdiction of the District Court, the Government has constantly shifted its ground from one position to another with the result that this litigation has been greatly delayed, the respondent has been put to enormous expense and an unconscionable burden has been imposed both upon the respondent and upon all of the courts below.

When the objection was first raised at the second hearing in the Circuit Court of Appeals, the sole argument of the Government was to the effect that this suit must necessarily be considered as having been brought to recover the $34,555.68 "as a tax for the year 1918" and that the District Court did not have jurisdiction of such a suit because the

1918 tax was "collected" by the Commissioner of Internal Revenue by way of a credit and not by a Collector of Internal Revenue, as was held in *Reeves Brothers Company* v. *United States* (C. C. A. 6th) 83 F. (2d) 121; certiorari denied 299 U. S. 573; 57 S. Ct. 37.

At the rehearing in the Circuit Court of Appeals, the Government completely abandoned its contention that the suit was brought to recover a 1918 tax, and insisted that the suit was brought either (1) on the Certificate of Overassessment as an "account stated" or (2) for the recovery of an "allowed overpayment" of the 1917 tax, and that the Circuit Court of Appeals in its opinion (R. Vol. II, pp. 65–68) had so held, contrary to the decisions of the Circuit Court of Appeals for the Second Circuit in the cases of *Moses* v. *United States* (C. C. A. 2d) 61 F. (2d) 791; certiorari denied 289 U. S. 743; 53 S. Ct. 689 and *Lowe Brothers Company* v. *United States* (C. C. A. 6th) 92 F. (2d) 905, affirmed 304 U. S. 302, 58 S. Ct. 896.

In this Court, both in the petition for the writ of certiorari and its brief, the Government does not strongly rely upon any of the arguments urged below but bases its attack upon the jurisdiction of the District Court on a variety of entirely new grounds none of which were relied upon in the courts below, among which are the following:

(1) That the suit is based on the Commissioner's refusal to allow a "special assessment claim" or that the ground asserted in the claim for refund upon which the suit is based was that special assessment should be granted under Section 210 of the Revenue Act of 1917, matters which this Court, in the case of *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551; 48 S. Ct. 587, held could not constitute the basis of a suit as they were entirely discretionary with the Commissioner of Internal Revenue.

(2) That the District Court was without jurisdiction as to the year 1917 because "it was not alleged and proved that a claim for refund was filed within four years of the payment of the tax for that year" as required by Section 3228 of the United States Revised Statutes.

(3) That the suit was not brought within two years of the rejection of such claim as required by Section 3228 of the United States Revised Statutes.

(4) That "the Commissioner's final disallowance of the refund of the $34,555.68 within two years of which this suit was brought, did not constitute a disallowance of any portion of an original timely claim" because the grounds asserted in the two claims are different as was held by this Court in the cases of *United States* v. *Andrews*, 302 U. S. 517; 58 S. Ct. 315 and *United States* v. *Garbutt Oil*, 302 U. S. 528; 58 S. Ct. 320.

(5) That "the credit of the allowed overpayment for 1917 against taxes assessed for the year 1918 precludes suit for the year 1917", in any court.

With the foregoing statement as a background, the respondent respectfully submits the following with respect to the four issues presented above:

As to the first issue:

I.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT, AT THE TIME THE ORIGINAL PETITION IN THIS SUIT WAS FILED, THE SAME KIND OF A SUIT OR THE SAME FORM OF ACTION COULD HAVE BEEN BROUGHT AND MAINTAINED AGAINST THE COLLECTOR OF INTERNAL REVENUE TO WHOM THE RESPONDENT PAID ITS TAXES FOR THE YEAR 1917.

First: Upon the allegations of the petition, it is clear that the suit was properly brought to recover the $34,555.68 as a 1917 tax wrongfully collected by the Collector of Internal Revenue.

It is fundamental that the purpose for which any suit is brought, the form of the action and the nature of a taxpayer's claim, must be determined by the allegations of the petition and not by the oral arguments and the briefs of either party. The original petition upon which the instant suit was brought (R. Vol. I, pp. 1–4) was filed on September 19, 1929 and contains, among others, the following express jurisdictional averments:

> "Third. This action is brought against the United States of America in the United States District Court for the District of Massachusetts, said court having jurisdiction of the matters herein complained of by the petitioner.
>
> "Fourth. The said action is one to recover back Federal War profits taxes, excess profits taxes and income taxes plus interest for the taxable periods ended December 31, 1917, or December 31, 1918, as the case may be, both years being sued jointly; which the taxpayer alleges were erroneously and illegally withheld from the said petitioner *or erroneously and illegally collected from the said petitioner* and is an action arising out of the laws of the United States providing for internal revenue.

"Fifth. All returns, payments, claims for refund, and other action requisite to this suit have been duly made and filed in due season, and the claims for refund as to the matters herein complained of have been denied or rejected by the Commissioner of Internal Revenue."

While it is true that the petition does declare in the alternative for the recovery of the sum in controversy as a "1917 tax" or as a "1918 tax", it is obvious that throughout all of the hearings and in all of the courts below the respondent relied upon its right to recover the $34,555.68 as *a wrongful and illegal collection* of the 1917 tax and considered the allegations of the petition with respect to the year 1918 as purely precautionary. The respondent never considered the application of that sum against the alleged taxes for 1918 as a valid collection for that year but insisted that at the time the credit was made it was barred by the five-year period of limitation provided in *Section 250* (d) *of the Revenue Act* of 1921 (p. 53, *infra*) and was expressly declared to be void under *Section 609 of the Revenue Act of* 1928 (p. 54, *infra*). In other words, the respondent *waived* its right to recover the sum in controversy as a 1918 tax and it is clear from all of the opinions that the courts below thus understood the respondent's position.

But, whether the suit be considered as one to recover the $34,555.68 as a 1917 tax or as a 1918 tax the Government has expressly admitted all of the facts necessary to sustain the jurisdiction of the District Court. The Government's answer (R. Vol. I, p. 3) which was filed on October 21, 1929 is as follows:

"Comes now the respondent in the above-entitled action and for answer to the petition filed herein admits each and every allegation in paragraphs First to Eighth, inclusive, of the said petition, . . ."

Moreover, the respondent's bill of exceptions, upon which the case was heard in the Circuit Court of Appeals the first time, was assented to by the Government before its allowance by the Court (R. Vol. I, p. 23) contains the following statements (R. Vol. I, p. 13) with respect to the respondent's full compliance with all of the jurisdictional requirements for the maintenance of this suit as an action to recover a 1917 tax:

> "All requisite conditions precedent to the bringing of its petition were complied with by the petitioner.
>
> "The pleadings are a part of this record and may be referred to as a part of this bill of exceptions.
>
> . . . . . .
>
> "Both at the original hearing and at the rehearing, the case was tried solely upon the pleadings, certain documentary evidence and upon facts agreed to in open court, as hereinafter set forth, . . .
>
> . . . . . .
>
> "At the trial it was agreed by counsel that the taxes which the petitioner paid for the year 1917 were paid on the dates and in the amounts as follows:
>
> \$112,817.39 was paid in April 1, 1918.
> \$100,000.00 was paid on June 17, 1918.
> \$10,000.00 was paid on February 28, 1919.
> \$54,768.84 was paid on August 8, 1919.
> \$6,510.54 was paid on October 14, 1920."

Despite all of the foregoing, which we respectfully submit conclusively shows that the suit was properly brought to recover the \$34,555.68 as a 1917 tax, the Government in its brief (p. 18) states that "the petition does not allege that the tax for 1917 was erroneously or illegally collected". The complete answer to this plain misstatement of the fact is to be found in the Fourth paragraph of the petition (R.

Vol. I, p. 1) which we have quoted above and where it is alleged that the action is one to recover back taxes . . . "which the taxpayer alleges were erroneously and illegally withheld from the said petitioner *or erroneously and illegally collected from the said petitioner*". The words "erroneously and illegally collected" necessarily apply to the year 1917 because the $34,555.68 was never actually "collected" from the petitioner as a 1918 tax. It was paid to and collected by the Collector of Internal Revenue as a 1917 tax.

Second: The District Court has twice found or ruled that this is a suit for the recovery of taxes for the year 1917 and the Circuit Court of Appeals has three times sustained those findings or rulings.

In the first opinion of the District Court (R. Vol. I, p. 40) Judge Brewster found and ruled as follows:

> "In its petition and amended petition the petitioner seeks to recover (a) the balance of an over-payment of 1917 income and profits tax, and (b) an additional sum claimed to be due for interest."

In the first opinion of the Circuit Court of Appeals (R. Vol. II, p. 4) Judge Morton said:

> "This is an action to recover $34,555.68 with interest, constituting part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the District Court (R. Vol. II, p. 16) Judge Sweeney found and ruled as follows:

> "This is an action at law to recover $34,555.68, with interest, constituting a part of an admitted over-payment by the plaintiff on its income taxes for 1917."

In the second opinion of the Circuit Court of Appeals (R. Vol. II, p. 65) of March 18, 1938, Judge Wilson said:

"This is an action by a taxpayer to recover the sum of $34,555.68 with interest as a part of an overpayment of $91,570.34 for income and excess profits taxes for the year 1917, which overpayment had been allowed by the Commissioner.

. . . . . .

". . . we think in the last analysis it is based on a claim for a balance of the overpayment for the 1917 tax and not for an illegal collection of a 1918 tax."

In the third opinion of the Circuit Court of Appeals on Rehearing (R. Vol. II, p. 78) Judge Wilson said:

"Upon a reconsideration of the facts and the briefs on rehearing, we think this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed, . . ."

The Government's contention that this suit should or must be considered as an action to recover the $34,555.68 as a 1918 tax is an obvious attempt to bring this case within the decision of this Court in the case of *Lowe Brothers Company* v. *United States, supra.* It is apparent, however, from the foregoing that the two cases are clearly distinguishable on the facts with respect to the tax year for which suit was brought. In the Lowe Brothers case, the suit was based entirely upon the alleged right of the taxpayer to recover in the District Court a 1917 tax which had been collected by way of a credit. If such was the situation in the case at bar, the respondent would admit that the Lowe Brothers Company case is decisive and that the Court below was in error. But, we respectfully submit, that the two cases are entirely distinguishable as was clearly pointed out by Judge Wilson in the opinion on rehearing (R. Vol. II, p. 78) in the following language:

"The case of *Lowe Bros.* v. *United States,* 92 Fed.

(2d) 905, affirmed by the Supreme Court on May 16, 1938, does not militate against the taxpayer's right of recovery in this case, since the tax for the year in question in that case was not collected by a collector who was dead or out of office, as the 1917 tax had been in this case, but was in effect collected by the Commissioner of Internal Revenue by applying an overpayment as a credit on taxes for a prior year, which the Commissioner attempted to do in this case for an alleged deficiency tax for 1918."

Third: This suit is not an action on an account stated nor is it based on an allowed claim.

The Government in its brief (pp. 24–25) makes the following contention:

> "C. The petition attempts to state a cause of action on an allowed claim for 1917, which is not within the jurisdiction of the District Court."

In support of this contention the brief states that the circuit Court of Appeals in its opinion of March 18, 1938 (R. Vol. II, pp. 65–68) held "that the action was to recover part of an overpayment which had been allowed" and that in its opinion after the rehearing (R. Vol. II, pp. 75–78) that Court treated the present suit, in so far as it relates to the year 1917, as one to recover that part of a claim for refund of a 1917 overpayment which had been allowed. In other words, the Government is accusing the Court below of shifting its position just as the Government itself, as we have pointed out above, did in its argument to that Court.

We respectfully submit that all of the language used in the earlier opinion of the Circuit Court of Appeals with reference to the year 1917 was merely used to dispose of the Government's then contention to the effect that the suit must be considered as a suit for the recovery of the 1918 tax and

cannot in justice and in truth be said to mean that the entire action was based on the theory that the Commissioner's Certificate of Overassessment constituted an account stated or on an allowed claim which carried with it the implied promise on the part of the United States to pay. It is obvious that all of the references to the effect that the overpayment for 1917 had been allowed was intended by the Court to mean that the "evidence" in the case clearly established the fact of the excessive collection. The Government completely misconstrues the language in the opinion of the Circuit Court of Appeals when it contends that the language used was a holding with respect to the *whole theory of the case or the form in which the action was brought.* The opinion of the Circuit Court of Appeals on rehearing (R. Vol. II, p. 76) completely clarifies the position of that Court on this issue and states as follows:

> "The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918.
>
> "It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. *Goodrich, Adm.* v. *Coffin,* 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. . . ."

Whatever the Government may say about the allegations of the petition, the respondent contends that none of the allegations therein can possibly be construed as meaning that this suit is brought on the theory of an account stated or on an allowed claim. Moreover, as pointed out by the Circuit Court of Appeals, the respondent refused to assent to the adjustments which the Commissioner was proposing to make with respect to its 1917 account. As early as December 30, 1925, the respondent requested the Commissioner to close out its account for the year 1917 on the basis of the Commissioner's determination that there had been an overassessment of $91,570.34 for that year. In denying that request, the Commissioner on January 23, 1926 (R. Vol. I, p. 35) addressed the following letter to the respondent:

> "Sirs: Receipt is acknowledged of your letter dated December 30, 1925, wherein you state that you accept the adjustment indicated in Bureau letter dated September 16, 1925, for the year 1917, resulting in an overassessment of $91,570.34 and request that the 1917 case be closed without waiting for the final determination of your tax liability for the year 1918.
>
> "You are advised that this office is unable to comply with your request for the reason that any additional tax which may be found to be due for the year 1918 will be offset against the overassessment for 1917, and as the final determination of the 1918 case has not yet been made, the 1917 case may not be closed at this time.
>
> . . . . . .

On October 11, 1927, immediately upon receipt of the Certificate of Overassessment and the check in partial payment, the respondent addressed the following letter (R. Vol. I, p. 23) to the Collector of Internal Revenue at Boston, Massachusetts:

"Dear Sir: This is to acknowledge receipt of your check for $87,119.59, which is absolutely accepted under protest, inasmuch as you have applied an outlawed tax for 1918 against our legally allowable refund.

Very truly yours,

BERTELSEN & PETERSEN ENGINEERING CO.
By

"Original of this letter rec'd 10/11/27
THOMAS W. WHITE, Collector.
By J. H. Russell, Deputy."

In the case of *Daube* v. *United States*, 289 U. S. 367; 53 S. Ct. 597, Mr. Justice Cardozo stated the essentials of "an account stated" as follows:

> "If the traditional tests, familiar to the law of contracts, are to be accepted as our guide, there was no account stated between government and taxpayer. No balance was arrived at as the result of computation and agreement. *Volkening* v. *DeGraaf*, 81 N. Y. 268, 271. The Commissioner did not inform the taxpayer that the tax had been overpaid in a determinate amount. The taxpayer did not give assent either expressly or by silence to the outcome of the audit. The essentials of an account stated in any strict or proper sense are lacking altogether. *Toland* v. *Sprague*, 12 Pet. 300, 333, 9 L. Ed. 1093; *Nutt* v. *United States*, 125 U. S. 650, 8 S. Ct. 997, 31 L. Ed. 821; *Volkening* v. *DeGraaf, supra; Newburger-Morris Co.* v. *Talcott*, 219 N. Y. 505, 511, 512, 114 N. E. 846, 3 A. L. R. 287 . . ."

Upon the evidence, therefore, it is clear that all of the requirements of an account stated or of an action based on an allowed claim are lacking in the case at bar and that the respondent did not allege or attempt to prove any such action.

Thus, on the first issue, we have shown (1) that the whole purpose or intent of the suit as revealed by the allegations of the petition, and the proof adduced at the trial, was to recover a wrongful and illegal collection of the respondent's 1917 taxes, *such as could have been brought against the Collector of Internal Revenue, to whom those taxes were paid, if he had still been in office;* (2) that the suit was not intended to be brought for the recovery of the sum in controversy as a 1918 tax, which was collected by way of a credit, as in the case of *Lowe Brothers Company* v. *United States, supra;* (3) that neither the allegations, the proof adduced at the trial nor the findings and rulings of the Court below tend to show that the suit is brought on the theory of an account stated or an allowed claim.

It is respectfully submitted, therefore, that the Circuit Court of Appeals did not err in affirming the decision of the District Court and in its own holding to the effect that this is a suit for the recovery of wrongful and illegally collected taxes for the year 1917 which could have been brought against the Collector of Internal Revenue.

As to the second issue:

II.

THE CIRCUIT COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE RESPONDENT FILED A TIMELY AND PROPER CLAIM FOR REFUND FOR THE YEAR 1917 AND BROUGHT THE SUIT WITHIN TWO YEARS THEREAFTER AS REQUIRED BY SECTION 3228 AND SECTION 3226 OF THE UNITED STATES REVISED STATUTES, RESPECTIVELY.

In view of (1) the admissions contained in the respondent's answer and in open Court to the effect that proper claims for refund had been timely filed and (2) of its assent to the bill of exceptions which stated that *"all requisite conditions precedent to the bringing of its petition were complied with by the petitioner"*, much of the evidence which the respondent, as petitioner-below, could have offered in that

regard and many of the facts upon which the Government is now attempting to base its so-called jurisdictional objection do not appear in this record. However, the respondent did prove through documentary evidence, could have proven, and still is ready, able and willing conclusively to prove that it fully complied with the statutes.

First: As a matter of fact the respondent filed proper and timely claims for refund for the year 1917.

1. The Bertelsen & Petersen Engineering Company, the respondent herein, filed five (5) claims for refund for the year 1917 on Treasury Department Form 843 for specified amounts "or such greater amount as is legally refundable", the dates of filing and the specified amounts of such claims being as follows:

Dates of Filing:	Amount of Claims:
February 28, 1923	$46,715.09
March 12, 1924	$75,000.00
March 31, 1925	$40,000.00
April 25, 1926	$91,570.34
November 28, 1927	$34,555.68

2. The claim of February 28, 1923 set forth as grounds for the allowance thereof the following:

> "Commission selling account disallowed as expense by Field Agent, claimed as necessary business expense; depreciation originally omitted for 1917, now claimed as expense; items charged as expense prior to January 1, 1917 restored as per Articles 840 and 841, and used for invested capital and depreciation;—all as per exhibits mailed to Washington."

3. The claim of March 12, 1924, was accompanied by a brief and stated as grounds for the allowance thereof, the following:

> "All evidence submitted in brief to Washington."

4. The claim of March 31, 1925 set forth as grounds for the allowance thereof the following:

> "All points at issue allowed showing refund except relief herein requested—Section 210—and now being considered."

5. The claim of April 25, 1926, which was filed within the limitation period as extended by waiver, set forth as grounds for the allowance thereof the following:

> "Claim is made for the above indicated amount together with interest thereon from the date paid in accordance with results as set forth in Treasury Department letter dated September 16, 1925, supplemented by sixty day letter the time on which expired April 26, 1926.
>
> "This claim is filed at the present time in order to protect our interests against expiration of limitation period thereon.
>
> "It is requested that claim be immediately forwarded to Washington in order that same may be assigned to auditor in Income Tax Unit, now making a review of our 1918 tax liability."

6. The claim of November 28, 1927, was accompanied by another claim for the same amount for the year 1918, and a brief. The 1917 claim does not appear in this record. But, the 1918 claim, although it was not offered in evidence in the District Court, was put in the Record (R. Vol. II, p. 38) by the Government in order to establish its argument in that Court to the effect that the suit was brought to recover the $34,555.68 as a 1918 tax. The 1918 claim is for $34,555.68 "plus such larger amount as may result plus interest" and states as grounds for its allowance the following:

> "Refund of additional taxes for this year of $34,

555.68, same having been paid out of refund for 1917 thru withholding by your Department. See brief for details."

7. The Commissioner never notified the respondent as to the dates of the rejection or allowance of all of the foregoing claims and the only specific notice which the respondent ever received as to any of the dates of rejection is contained in a memorandum prepared by the Chairman of the Special Committee of the Bureau of Internal Revenue and signed by the Deputy Commissioner, a copy of which was furnished to the respondent, which contains the following statement:

"On November 28, 1927, the taxpayer filed with the Collector of Internal Revenue for its district claims for refund for 1917 and 1918 each for $34,555.68 on the grounds that interest had been erroneously computed and that the additional tax for 1918 had never been assessed but was used as an offset against the overassessment for 1917 after the period of limitation for making assessments as extended by waiver had expired. *The claims were considered on the merits and in Bureau letter dated February 6, 1928, they were proposed for rejection.* The official rejection appeared on schedule No. 11471 dated February 28, 1928. Within two years from the disallowance of said claims, namely, on or about August 28, 1929, a petition was filed with the United States District Court for the District of Massachusetts for the recovery of $34,555.68 and interest thereon which amount was alleged to have been erroneously and illegally withheld (*this allegation applies to 1917*) or erroneously and illegally collected (*this allegation applies to 1918*) from the petitioner." (Italics supplied.)

8. The petition in this suit was filed on September 19,

1929 (R. Vol. I, p. 1) which was clearly within the two-year period as required by Section 3226 of the United States Revised Statutes (p. 52, *infra*).

Second: As a matter of law the respondent, as petitioner below, fully complied with the statutes in so far as the allegations of the petition and the claims for refund are concerned.

Despite its own admissions and all of the foregoing facts with respect to the timely filing of proper claims for refund and the timely bringing of the suit for the $34,555.68, as a 1917 tax, the Government in its brief (p. 11) makes the following clearly unfair and unwarranted statement:

> "The petition is deficient in that it does not allege the filing of a claim for refund within four years of the payment of the tax for 1917, and the bringing of suit within two years of the rejection thereof or within five years of the payment of the tax; . . ."

The complete answer to this contention is that under the applicable statute it is not required that the petition in a suit of this kind must contain such allegation. The *Act of March 3, 1887*, c. 359, Para. 5; 24 Stat. 506; 28 U. S. C. 762, provides as follows:

> "762. PETITION IN SUIT AGAINST UNITED STATES.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law."

Moreover, it is an elementary principle of law and pleading that statutes of limitation are not jurisdictional and must be specially pleaded in the trial Court. If such statutes are not invoked and pleaded in the trial Court they cannot be set up in the Appellate Court under the guise that the trial Court did not have jurisdiction. Obviously, Section 3228, of the United States Revised Statutes, which provides for the filing of the claim for refund within four years after payment of the tax and Section 3226, which provides that suit must be brought within five years after payment or within two years after disallowance of the claim, are both statutes of limitations and the Courts have uniformly held that those statutes are not jurisdictional and must be specially pleaded.

In the case of *Western Wheel Scraper Company* v. *United States*, 72 F. (2d) 487, the Circuit Court of Appeals for the Seventh Circuit held:

> "To sustain its contention that the District Court was without jurisdiction of this cause, the government relies upon a section 3226 of the Revised Statutes (as amended, 26 USCA par. 156). This section provides that, before any taxpayer shall commence suit to recover any internal revenue tax which he believes to have been erroneously or illegally assessed or collected, he must first file a claim for refund with the Commissioner of Internal Revenue and then wait six months unless the Commissioner renders a decision within that time. It is also provided that suit must be brought not later than five years from the date of the payment of the tax or two years after the disallowance of the part of the claim to which the suit relates. As we read this section of the statute, it was intended to save the parties the expense of litigation and give the Commissioner an opportunity to settle controversies before suit is commenced thereon, *not for the purpose of conferring jurisdiction upon the courts.*" (Italics supplied.)

In the case of *Retzer* v. *Wood*, 109 U. S. 185; 3 S. Ct. 164, this Court said:

"The statute of limitations was not pleaded. . . .

. . . . . .

"As to the defense of the statute of limitations, it was not pleaded, nor brought to the attention of the court, as a defense, at the trial. It was not within the issue raised by the plea of the general issue, which was the only issue to which the stipulation for a trial by the court extended. It is well settled that, in the absence of a contrary rule established by statute, a defendant who desires to avail himself of a statute of limitation as a defense must raise the question either in the pleading, or on the trial, or before judgment. *Storm* v. *United States*, 94 U. S. 76, 81; *Upton* v. *McLaughlin*, 105 U. S. 640. . . . When the testimony at the trial closed, and the plaintiff asked for a judgment in his favor, he was entitled to it. It is proper that the circuit court should be directed to enter such a judgment. The conclusion of law, by the circuit court, that the tax was illegally exacted being a correct conclusion, and its conclusion that the suit was barred by limitation being an incorrect conclusion, it follows that the plaintiff was entitled to judgment on the facts found. The special findings of fact were equivalent to a special verdict, and the question thereon was whether they required a judgment for the plaintiff or the defendant. . . ."

In the case of *Upton* v. *McLaughlin*, 105 U. S. 640; 26 L. Ed. 1199 this Court held that the statute of limitations must be raised in the District Court by an appropriate pleading and in the course of the opinion said:

"The question is not to be treated as one of power or

jurisdiction, but as one dependent on the principles applicable to statutes of limitation generally.

"This being so, the record shows that no question as to the application of the statute to the case was raised in the District Court of the Territory by the defendant, either in pleading or on the trial or before judgment. It is too late for a defendant who does not take, prior to a judgment against him, the point that the action is barred by a statute of limitation, to raise the point for the first time in an appellate court. This principle is always applied to questions which are not questions of jurisdiction." (Cases cited.)

We have thus shown, therefore, that the whole contention of the Government in regard to the insufficiency of the allegations of the petition and the proof in regard to the timely and proper filing of claims for refund and the timely bringing of suit thereafter, are clearly untenable (1) because the statute itself does not require that petitions filed under *Section* 24 (20) *of the Judicial Code* must allege compliance with *Section* 3226 and *Section* 3226 *of the United States Revised Statutes,* (2) because both of those sections are statutes of limitations and the Government failed to plead and invoke them in the District Court and (3) because the Government admitted by its answer, in open Court and in the bill of exceptions, that the requirements of those sections had been fully complied with and no further proof of such compliance was necessary.

Third: This suit is not based on a special assessment claim or the Commissioner's refusal to grant special assessment under Section 210 of the Revenue Act of 1917.

The Government in its brief discusses numerous questions such as (1) the tax year to which the suit relates, (2) alleged defects in the allegations of the petition and (3) the failure of the respondent to file timely and proper claims for refund

and to bring the suit within two years thereafter. But, the sole question presented for the decision of this Court both in the petition for the writ or certiorari and in its brief on the merits (p. 2), is stated as follows:

> "Whether the District Court has jurisdiction of a suit against the United States for the year 1917 seeking the recovery of internal revenue taxes in excess of $10,000 where the amount sought to be recovered constitutes a portion of the amount allowed by the Commissioner on a special assessment claim for 1917 which was credited against a barred deficiency for 1918 and where the claim for refund upon which jurisdiction is asserted was filed more than four years after the payment of the 1917 tax."

No such question as this was raised or presented to the Circuit Court of Appeals in any of the hearings or at the rehearing before that Court. The sole purpose of the Government in raising the issue of special assessment for the first time in this Court is to bring the case at bar within the decision in *Williamsport Wire Rope Company* v. *United States*, 277 U. S. 551; 48 S. Ct. 587, in which it was held that the matter of special assessment was purely discretionary with the Commissioner of Internal Revenue and that the Commissioner's refusal to grant special assessment could not be made the basis of a suit, as is the case where the Commissioner refuses or disallows an ordinary claim for refund. *The original petition in this case contains no allegation whatsoever with respect to any special assessment claim and the respondent never complained nor does it now complain of any refusal of the Commissioner of Internal Revenue to grant special assessment.* If this issue had been raised in the District Court the contentions of the Government could have been completely disproved.

The Government bases this whole contention in regard to

special assessment upon the language used in the Commissioner's letter of September 16, 1925 (R. Vol. I, pp. 30–33) which does seem to indicate that the $91,570.34 which the Commissioner first proposed to allow for refund of the 1917 tax was determined by way of special assessment. But, the memorandum of the advisory Committee signed by the Deputy Commissioner which is referred to by the Circuit Court of Appeals (R. Vol. II, p. 76) was the final communication which the respondent received as to its special assessment claim states as follows:

> "The claims for refund for 1917 and 1918 based upon special assessment which were proposed for rejection in the sixty-day letter were officially disallowed on schedule No. 7212 dated August 2, 1926."

With respect to the Commissioner's action on the claims for refund the letter (R. Vol. I, p. 32) states as follows:

> "In accordance with the above conclusions, your claims for the refund of $46,715.09 and $75,000.00, aggregating $121,715.09, will be rejected for $30,144.75."

By this letter the respondent's claims were officially rejected *only to the extent of the $30,144.75.* The balance of the claim was neither allowed nor rejected by the letter of September 16, 1925. A part of the balance, however, was paid but the portion of the claims amounting to $34,555.68 was never paid and this portion of these original claims was specifically rejected on "Schedule 11471 dated February 28, 1928". This explicit rejection was the result of the demand for payment of that specific amount by the claim filed on November 28, 1927, as has been stated above.

On the facts, the case at bar, in so far as the Government's contention with respect to a special assessment claim is concerned, is much stronger than that of *Factors & Finance Company* v. *United States* (Ct. Cl.) 56 Fed. (2d) 902; af-

firmed 288 U. S. 289; 53 S. Ct. 287, in which case the taxpayer prevailed. In that case the only claim which the taxpayer filed within the statutory period was a general one without any statement of the grounds for its allowance. After the statute had run an amended claim was filed which "set forth specifically that the refund should be granted for the reason that the profits tax should be computed under the provisions of *Section* 210 *of the Revenue Act* of 1917 and requested the Commissioner to make such computation. The Commissioner disallowed the claim and refused refund solely on the ground that the amendment was filed too late. The Court of Claims overruled the objection of the Government and this Court sustained the decision. In sustaining the contentions of the taxpayer and allowing recovery the Court of Claims, referring to Section 210 of the Act of 1917, among other things, said:

> "So far as a refund by the Commissioner is concerned, these provisions do not require the statement in the claim of the facts or theory upon which the claim is based. He may allow such a claim upon any facts of which he may have knowledge or which he may himself obtain. . . .
>
> . . . . . .
>
> "Thus, the prime purpose of a refund claim is to give the Commissioner jurisdiction over the matter. He may then of his own accord give the taxpayer any relief which he thinks proper."

In affirming the decision of the Court of Claims Mr. Justice Cardozo (53 S. Ct. 287, 289) said:

> "Under section 210 of the Act of 1917, as under section 327 (a) of the Act of 1918, the Commissioner acts of his own motion whenever he is unable to satisfy him-

self that the valuation will be accurate if there is adherence to the statute.

. . . . . .

"This question, if no other, he must have considered and determined when a claim for refund was submitted by the taxpayer without specifying the grounds. *United States* v. *Memphis Oil Co.*, 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619. This question if no other, he must again have considered and determined when he certified to the taxpayer, after the claim had been amended and after submission of the evidence, that section 210 of the Act of 1917 supplied the applicable rule. It is a question that in last analysis is addressed to his own conscience, and, in the absence of any evidence impeaching his conclusion, his certificate of satisfaction or the contrary is binding on the courts.

"The cumulative force of these administrative opportunities and these procedural analogies upholds the claim and the amendment."

If the respondent had intended to base its suit (1) on the Commissioner's refusal to grant a special assessment claim or (2) upon the Commissioner's refusal to pay the amount which he had allowed on a special assessment claim, such a suit must have been brought within two years of August 2, 1926. No such suit was ever thought of or attempted because the respondent well knew that such a suit would clearly be impermissible under the decision of this Court in the case of *Williamsport Wire Rope Company* v. *United States, supra,* and the other cases which have followed in the wake of that decision.

Even if the Commissioner did determine that the respondent's *claims for refund* should be allowed in the amount of $91,570.34 which he had determined to be allowable by resort to *Section* 210 *of the Act of* 1917, the actual

fact of the matter is, as we have already pointed out, that he *officially disallowed the claim for refund* to the extent of $34,555.68 on the official Schedule of Rejected Claims No. 11472 dated February 28, 1928 (R. Vol. II, p. 76) and it is the disallowance or his refusal to refund that amount upon which this suit is based.

In the case of *Ridgway* v. *United States,* 18 Ct. Cl. 707; 4 A.F.T. R. 4915, 4918–4919, Judge Richardson of the Court of Claims said:

> "Until, therefore, the taxes were paid back the action of the Commissioner authorized by the statute was not consummated. . . .
>
> . . . . . .
>
> "It is payment that the statute authorizes him to make, and until payment is made his authority over the matter is not exhausted, unless, perhaps, the claimant should acquire a vested right by bringing suit before revocation, as to which we express no opinion."

It is clear, therefore, (1) that the issues of this case are entirely unrelated to the question of special assessment (2) that the action is based on a statutory claim for refund (3) that the suit was "begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates" as required by *Section 3226 of the United States Revised Statutes* (p. 52, *infra*) and (4) that none of these questions are properly raised in this Court because none of them were pleaded and timely raised in the Courts below.

Fourth: The claim for refund for the year 1917 filed on November 28, 1927, was not a new claim nor was it based on different grounds from those stated in the original timely claim.

In its brief (p. 16) the Government makes the following contention:

"Considered as an original claim for refund, the claim for 1917 filed on November 28, 1927, of course would have no legal effect, for it was filed more than four years after 1920, the date on which the last of the taxes for 1917 had been paid. *United States* v. *Andrews,* 302 U. S. 517; *United States* v. *Garbutt Oil Co.,* 302 U. S. 528. It also could not be treated as an amendment to an earlier filed claim for 1917, for such claim had theretofore been definitely disposed of either by its allowance in the schedule of refunds and credits signed by the Commissioner on October 11, 1926 (O. R. 51), or its putative disallowance by the act of the Commissioner in the same instrument of crediting part of the allowed overpayment against the deficiency for 1918 . . . "

In our preceding argument, we have considered the rejection of the 1917 claim of November 28, 1927 on February 28, 1928 as an outright disallowance of that portion of the original timely claims (R. Vol. I, p. 32) to which this suit relates.

Here, we submit to the Court, that even if the act of the Commissioner in making the credit constituted a rejection of the original claim to the extent of the $34,555.68, the respondent did not remain idle and permit the two-year period for bringing suit to expire without taking action. The claim for refund or payment of the $34,555.68 was filed on November 28, 1927, which clearly related back to the original claims, was, upon the great weight of authority, a request for a reopening or reconsideration of the original claims.

Since, therefore, the Commissioner accepted the claim of November 28, 1927, as a valid and proper claim, considered it on its merits and officially rejected it on February 28, 1928, the Circuit Court of Appeals held (1) that the original claim to the extent of the $34,555.68, had never been rejected until February 28, 1928 on the basis of all of the authorities cited

in the opinion on rehearing (R. Vol. II, pp. 76-77) and (2) that since this suit was brought on September 19, 1929 (R. Vol. I, p. 1) the action was timely brought under *Section 3226 of the United States Revised Statutes:*

Jones v. *United States*, 5 F. Supp. 146, 152
Mobile Drug Co. v. *United States* (D. C.), 39 F. (2d) 940
McKesson & Robbins, Inc. v. *Edwards* (C. C. A.), 57 F. (2d) 147
Ford Motor Co. v. *United States* (Ct. Cl.), 3 F. Supp. 423
Hickman v. *United States* (D. C.), 47 F. (2d) 328
Southwestern Oil & Gas Company v. *United States*, 29 F. (2d) 404, 406, certiorari denied, 280 U. S. 601
Pacific Mills v. *Nichols*, 72 F. (2d) 103, 107.

In the case of *United States* v. *Memphis Cotton Oil Company*, 288 U. S. 62; 53 S. Ct. 278, this Court held (1) that where a claim for refund was defective it might be amended even after the statute of limitations had run against the filing of a new claim or the rejection of an old one and (2) that if the Commissioner accepted the latter claim and considered it on its merits the period within which suit could be brought began to run upon the Commissioner's final consideration and rejection. In the course of that opinion Mr. Justice Cardozo said:

" . . . This is far from saying that there was the presentation of a new claim and not the perfecting of an old one when the gaps were filled thereafter.

. . . . . .

"The line of division must be kept a sharp one between the function of a statute requiring the presentation of a claim within a given period of time, and the

function of a regulation making provision as to form. The funcion of the statute, like that of limitations generally, is to give protection against stale demands. The function of the regulation is to facilitate research. The Commissioner has the remedy in his own hands if the claim as presented is so indefinite as to cause embarrassment to him or to others in his Bureau. He may disallow the claim promptly for a departure from the rule. If, however, he holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, *what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old. . . .*" (Italics supplied.)

It is perfectly clear on the facts of the case at bar and upon all of the foregoing authorities that the case at bar is clearly distinguishable from the case of *United States* v. *Andrews, supra*, and *United States* v. *Garbutt Oil Company*. In the Andrews case the facts in regard to the claim and the attempted amendment, as stated by Mr. Justice Roberts, were as follows:

"The claim here was not general but specific. . . . it pointed to two specific items of deduction which had not been taken and to which the taxpayer claimed to be entitled. . . . It was ascertained that litigation was in process upon the outcome of which would depend a decision as to the alleged worthlessness of some of the shares in question. . . . "While matters were in this posture, and after the period of limitation had expired, the respondent presented a so-called amendment of her claim having no relation whatever to the items set forth in the original claim but dealing with a wholly distinct item of $36,750 reported as dividends received and asking that it be eliminated from that category and that

> the transaction be reclassified as capital gain upon a basis which would result in a reduction of tax by some $6,000. This is not a case where the Commissioner waived the regulation with respect to the particularity with which the grounds of the claim must be set forth. There was no need for him to do so. The claim was not general like that in the Memphis Cotton Oil Case and the others following in its train. . . . "

It is respectfully submitted, therefore, that the holding of the Circuit Court of Appeals to the effect that the Commissioner's conduct with respect to the claim of November 27, 1928, as constituting a reopening or reconsideration of an original timely claim, is sound and supported by the great weight of authority and that the cases of *United States* v. *Andrews* and *United States* v. *Garbutt Oil Co., supra,* upon which the Government relies are clearly not in point as they are so obviously distinguishable upon the facts. In both of those cases, the taxpayer not only permitted either the five-year period after payment, or the two-year period after disallowance of the claim, to expire, the attempted amendment in both of those cases was a complete transfiguration or departure and had no relationship whatsoever to the grounds asserted in the original claim. No such situation as that exists in the case at bar.

On the second issue therefore, we have shown (1) that as a matter of fact the respondent filed proper and timely claims for refund for the year 1917 (2) that as a matter of law the respondent, as petitioner below, fully complied with the statutes in so far as the allegations of the petition and the claims for refund are concerned (3) that this suit is not based on a special assessment claim or the Commissioner's refusal to grant special assessment under Section 210 of the Revenue Act of 1917 and (4) that the claim for refund for the year 1917 filed on November 28, 1927, was not a new

claim nor was it based on different grounds from those stated in the original timely claim.

It is respectfully submitted, therefore, that the Circuit Court of Appeals did not err in holding that the respondent filed a timely and proper claim for refund for the year 1917 and brought the suit within two years thereafter as required by *Section 3228* and *Section 3226 of the United States Revised Statutes*, respectively.

As to the third issue.

III.

THIS COURT SHOULD NOT HOLD AND RULE THAT WHENEVER A COLLECTOR OF INTERNAL REVENUE MAKES A WRONGFUL AND EXCESSIVE COLLECTION OF A TAX FOR ONE YEAR AND THE COMMISSIONER OF INTERNAL REVENUE WRONGFULLY CREDITS THAT SUM AGAINST AN OUTLAWED TAX FOR ANOTHER YEAR, WITHOUT THE TAXPAYER'S CONSENT, THEN AND IN THAT EVENT THE TAXPAYER'S ONLY REMEDY IS A SUIT FOR SUCH SUM AS A TAX FOR THE YEAR TO WHICH THE CREDIT IS MADE.

Both in this case and in the case of *United States* v. *Jaffray et al*, No. 437, which is to be argued immediately following this case, the Government argues for an arbitrary, restrictive and unreasonable rule from this Court to the effect that, whenever the Commissioner of Internal Revenue wrongfully and illegally credits an excessive collection for one year against outlawed taxes for another year, then the taxpayer cannot bring a suit in any form or in any Court for the recovery of a tax for the year of the wrongful collection, but must bring the suit for a tax with respect to the year to which the credit is made, regardless of the fact that the Commissioner of Internal Revenue made such credits after the applicable statute of limitations had run and notwithstanding the fact that *Section 609 of the Revenue Act of 1928* (p. 54, *infra*) expressly declares such credits to be void. This proposition is stated in the Government's brief (p. 25) as follows:

"B. The credit or part of the overpayment for 1917 against taxes assessed for 1918 precludes suit for the year 1917."

Under such a rule the right of the taxpayer to avail himself of the economy, convenience and other benefits which were obviously intended under *Section* 24(20) *of the Judicial Code as amended,* would be even further limited, circumscribed or restricted than has ever been done by this Court or by any other Court, as is shown by the fact that the Government does not cite a single case in support of its proposition. Such a rule would operate as an extreme hardship upon taxpayers in general and would only add to the great confusion and conflict which already exist among the decisions in a large number of cases involving taxes which have been overpaid for one year and have, without the consent of the taxpayer, been erroneously credited by the Commissioner of Internal Revenue to outlawed taxes for other years. Such a holding by this Court would not only deprive the taxpayer of his right to protest against an illegal collection before it was made but it would completely deprive him of his common law right of action for "money had and received", against the Collector of Internal Revenue who exacted the wrongful payment and force all taxpayers, under such circumstances, to incur the great expense and inconvenience of taking themselves and their witnesses to Washington in order to prosecute their suits in the Court of Claims. The utter fallacy and injustice of such a rule, *where the credit is outlawed and "void",* was clearly illustrated in the case of *United States* v. *Jaffry* in the Circuit Court of Appeals, thus:

" . . . Suppose a taxpayer makes a cash overpayment of his 1935 tax, which the Commissioner credits to a deficiency for 1928. If the argument in the appellant's brief be sound, the taxpayer would then have to

sue for 1928. Suppose he does so, but that then the Commissioner decides that he was mistaken, that there was no tax due for 1928, instead determines a deficiency for 1931, 'reverses' the previous credit, and applies the 1928 overpayment to 1931. Under the Government's theory the taxpayer would then have to drop his suit for 1928 and begin all over again for 1931. The process of reversal, dismissal, and new suit could go on forever. . . . "

Lastly, such a rule would be so arbitrary, capricious and unreasonable as to defeat the whole purpose and intent of *Section* 24(20) *of the Judicial Code, as amended, by the Act of February* 3, 1925 (p. 51, *infra*), a statute which, we respectfully submit, should be liberally construed in favor of the taxpayer since the extension of the jurisdiction of the District Courts under that section intended primarily for the benefit of the taxpayer as has clearly been shown by numerous decisions of this Court.

In the case of *Christie-Street Commission Co.* v. *United States,* 136 F. 326, 329–330, Judge Sanborn for the Circuit Court of Appeals for the Eighth Circuit, in construing the original Act of 1887, *supra,* said:

"The acts of 1855 and 1887 here under consideration mark a rational and gratifying advance in civilization and public policy, and they should be liberally construed to accomplish the benign purpose of their enactment. The theory that a nation or its government should refuse to submit its controversies with its citizens to the adjudication of impartial tribunals is but the fast receding echo of the rule that the King can do no wrong. There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. There is no reason why a government should not submit its controversies with

its subjects to adjudication, or why it should not itself practice that justice whose administration is the great purpose of its existence. Justice demands, and a wise public policy requires, that nations should submit themselves to the judgment of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs, as universally as individuals."

In the case of *United States* v. *Emery, Bird, Thayer Realty Company*, 237 U. S. 28; 35 S. Ct. 499, the Government argued that the taxpayer's only remedy for an illegally collected tax was a suit against the Collector of Internal Revenue and that the Court of Claims did not have jurisdiction. In overruling the objections, Mr. Justice Holmes said:

"The objection to the jurisdiction pressed by the government is that the only remedy is a suit against the collector. As the United States has received and keeps the money, and would indemnify the collector if he had to pay (Rev. Stat. No. 3220, Comp. Stat. 1913, No. 5944), the least that can be said is that it would be adding a fifth wheel to the coach to require a circuitous process to satisfy just claims. It is true that this tax law provides that 'all laws relating to the collection, remission, and refund of internal revenue taxes, so far as applicable,' etc., are extended to this tax (No. 38, 36 Stat. at L. 117, Chap. 6), *but that is far from the case of a statute creating a new right and a special remedy to enforce it in such form as to make that remedy exclusive. The right to sue the collector for an unjustified collection was given by the common law. . . .* However, gradually the result may have been approached in the earlier cases, it now has become accepted law that claims like the present are 'founded upon' the revenue law. The argument that there is a distinction between claims 'arising under' (Judicial Code, No. 24, first) and those

'founded upon' (id. No. 24, twentieth) a law of the United States *rests on the inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye.*" (Cases cited.) (Italics supplied.)

In the case of *Bates Manufacturing Company* v. *United States,* 303 U. S. 567; 58 S. Ct. 694, this Court put a much broader and more liberal interpretation upon *Section* 24 (20) *of the Judicial Code* than that for which the Government here contends. In that case Mr. Justice Black said:

"The substantial rights of claimants are to be governed alike whether suit is brought in the Court of Claims or the District Court. The author of the Tucker Act in declaring the statute of limitations applicable alike 'to any or all' of the cases arising under the Act drew no distinction between suits brought in the District Court and in the Court of Claims.

"The purpose of giving the District Courts concurrent jurisdiction with the Court of Claims was to provide additional opportunity for the consideration and determination of claims that had 'long pressed upon the consideration of Congress' and to permit suit to 'be brought in the District where the parties reside. . . . '

. . . . . .

" . . . *The erection of barriers to recover in the District Courts which did not exist in the Court of Claims would have tended to defeat the prime objectives of the Act.* Uniformity and equality in substantial rights and privileges—for claimants in both forums—were essential features in the system. Distinctions between the opportunities for recovery afforded in the two forums would have tended to mar the symmetry of the plan and to impair its effective and successful operation. As to substantial rights, Congress evidently meant to give

claimants an identical status in both Courts where the amount in controversy was included in the jurisdiction of both. . . . " (Italics supplied.)

It is thus clear that the rule for which the Government is contending would be contrary to the whole purpose and intent of the Tucker Act ,as well as the amendment. Moreover, such a holding is entirely unnecessary in so far as the consideration of this case on the merits is concerned. As to the third issue, therefore, it is respectfully submitted, therefore, that this Court should not hold and rule that whenever a Collector of Internal Revenue makes a wrongful and excessive collection of a tax for one year and the Commissioner of Internal Revenue credits the sum thus collected against an outlawed tax for another year without the taxpayer's consent, then the taxpayer's only remedy is a suit for such sum as a tax fax for the year to which the credit is made.

As to the fourth issue:

IV.

AS A MATTER OF LAW, EQUITY AND GOOD CONSCIENCE, THE GOVERNMENT WAIVED THE RIGHT TO RAISE ITS SO-CALLED JURISDICTIONAL OBJECTION IN THE APPELLATE COURTS BY VIRTUE OF THE FACT THAT IT APPEARED, PLEADED AND EXPRESSLY ADMITTED ALL OF THE FACTS NECESSARY TO SUSTAIN THE JURISDICTION OF THE DISTRICT COURT.

We are not unmindful of the sovereign immunities of the Government, of the fact that it can be sued only on its own terms and of the general rule to the effect that an objection to the jurisdiction of a Court may be raised at any stage of the proceeding. It is equally true, however, that the United States can just as an individual submit itself to the jurisdiction of the District Court and that the rule with respect to the objection to the jurisdiction of the Court does not apply where the Court has inherent jurisdiction of the subject matter. In this case the Government's objection is

not based on the ground that the District Court did not have jurisdiction of the subject matter. It is based solely on the form of the action, the nature of the plaintiff's claim or on matters of fact which could have been pleaded and proved or disproved in the District Court. This we submit is a case where the District Court did have inherent jurisdiction of the subject matter under *Section* 24 (5) *of the Judicial Code, as amended,* which provides as follows:

> "The District Courts shall have original jurisdiction . . . of all cases *arising under any law providing for internal revenue.* . . . "

Moreover, the *Act of March* 3, 1887, c. 359; 24 Stat. 506; 28 U. S. C. 763 (p. 50, *infra*) invests the Attorney General of the United States and the District Attorney upon whom the petition is served with full authority to represent the United States and requires them "to file a plea, answer or demurrer on the part of the Government and to file a notice of any counter-claim, set-off, claim for damages or other demand or defense whatsoever of the Government in the premises". Under these circumstances, therefore, the respondent submits that since the United States did appear by its duly qualified officers and admit the jurisdiction of the District Court, the Government should be bound by those admissions just as any other litigant would be bound if he accepted the jurisdiction of any Court which is invested with inherent jurisdiction over the subject matter. Especially should this Court so hold in this case, because as has been pointed out, the Government's objection in its final analysis does not deal with real jurisdictional issues but is based upon matters of fact, all of which could have been pleaded and proved, if they were true, and, we submit, should have been timely pleaded in the District Court. The mere fact that the objection is called a jurisdictional one does not and cannot

change the nature of facts upon which the asserted objection rests.

In the case of *Primos Chemical Company* v. *Fulton Steel Corporation,* 254, Fed. 454, 458, the Court said:

> "Questions of jurisdiction in the United States courts are not free from perplexities . . .
>
> . . . . . .
>
> "There is such a thing as jurisdiction of the person which can be given by consent of the defendant, he waiving his right to be sued in a given district, and there is such a thing as jurisdiction of the subject-matter of the suit, which cannot be conferred on any court by either assumption of jurisdiction or by consent of the parties, or of either or any of them, or by request of all the parties to the suit." (Cases cited.)

In the case of *Howbert, Collector* v. *Penrose,* 38 F. (2) 577, 581, the Government failed timely to raise an objection to the sufficiency of the claim for refund, and based its objection on jurisdictional grounds when it was too late for the taxpayer to remedy the defect. In that case, as in the case at bar, the objection was raised only by way of argument and was not pleaded. The Court overruled the objection of the Government because the issue had not been raised in its answer and said:

> "If the defendant had challenged the sufficiency of the claim by his answer, the plaintiff had abundant time to supply the deficiency by a new or an amended claim. When the point was first raised at the trial in October, 1928, both periods of limitation had expired.
>
> "The question is not free from doubt, but on the whole, we are of the opinion that the sufficiency of the claim for refund was not put in issue, and that the plaintiff is entitled to recover this tax. The defendant con-

cedes that he is entitled to it on the merits; and while 'men must turn square corners when they deal with the Government' (*Rock Island, etc., R. Co.* v. *United States,* 254 U. S. 141, 41 S. Ct. 55, 65 L. Ed. 188), *the government ought to turn square corners when dealing with its citizens. There is another maxim applicable in both of these appeals, and that is the substance should be given the right of way over form. Eisner* v. *Macomber,* 252 U. S. 189, 40 S. Ct. 189, 64 L. Ed. 521, 9 A. L. R. 1570; *Bowers* v. *Kerbaugh-Empire Co.,* 271 U. S. 170, 46 S. Ct. 449, 70 L. Ed. 886.

"The claim for refund should have been more particular; *but if the defendant expected to avoid the repayment of this illegally collected tax on that account, he should have been more particular in his answer.* The derelictions of the parties are about equal, and if the matter is at large, *the tax ought to be repaid, for concededly the government has no right to it.*" (Italics supplied.)

In the case of *Tucker* v. *Alexander,* 275 U. S. 228; 48 S. Ct. 45, 46, this Court, through Mr. Justice Stone, said:

"Literal compliance with statutory requirements that a claim or appeal be filed with the Commissioner before a suit is brought for a tax refund may be insisted upon by the defendant, whether the collector or the United States. (Cases cited.) But no case appears to have held that such objections as that urged here may not be dispensed with by stipulation in open court on the trial. The statute and the regulations must be read in the light of their purpose. They are devised, not as traps for the unwary, but for the convenience of government officials in passing upon claims for refund and in preparing for trial. Failure to observe them does not necessarily preclude recovery. If compliance is in-

sisted upon, dismissal of the suit may be followed by a new claim for refund and another suit within the period of limitations. If the Commissioner is not deceived or misled by the failure to describe accurately the claim, as obviously he was not here, it may be more convenient for the government and decidedly in the interest of an orderly administrative procedure that the claim should be disposed of upon its merits on a first trial without imposing upon government and taxpayer the necessity of further legal proceedings. We can perceive no valid reason why the requirements of the regulations may not be waived for that purpose. We are not unmindful of those cases holding that in suits against the Government no officer of the government may waive statutes of limitations. *Finn* v. *United States*, 123 U. S. 227, 8 S. Ct. 82, 31 L. Ed. 128."

In the case of *Naumkeag Steam Cotton Co.* v. *United States*, 2 Fed. Supp. 126, 133, Chief Justice Booth of the Court of Claims invoked the doctrine of estoppel as laid down in the case of *Dickerson* v. *Colgrove*, 100 U. S. 578, 580; 25 L. Ed. 618, in which Mr. Justice Swayne of this Court said:

> "'The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. *Such a change of position is sternly forbidden . . . There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on.* The rule does not rest on the assumption

that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect.'

"The relief of equitable estoppel is administered in favor of one who has been induced to alter his line of conduct with respect to the subject matter in controversy so as to have foregone some right or remedy which he otherwise would have taken. *Under the doctrine of equitable estoppel, a person is held to a representation made or a position assumed, where otherwise inequitable consequence would result to another, who having the right to do so under all circumstances of the case, has, in good faith, relied thereon.*" (Italics supplied.)

In the case of *United States* v. *Hvoslef, et al.*, 237 U. S. 1; 35 S. Ct. 459, 462, which was a suit involving illegally collected revenue taxes, this Court affirmed the judgment of the District Court, overruling the Government's demurrer. Mr. Justice Hughes said:

"Another objection to the jurisdiction of the district court is that under par. 5 of the Tucker act . . . the suit was to be brought 'in the district where the plaintiff resides.' . . . It is said that the allegation was insufficient to show the residence required by the statute, but it does not appear that any such objection was made in the court below. The general language of the demurrer with respect to jurisdiction had appropriate reference to the general authority of the court to entertain such a suit against the United States and to the jurisdiction of the subject-matter of the action. But assuming that the subject-matter was within the jurisdiction of the court, the requirement as to the particular district within

which the suit should be brought was a *modal and formal one, which could be waived*, and must be deemed to be waived in the absence of specific objection upon this ground before pleading to the merits. . . . " (Cases cited.) (Italics supplied.)

In the case of *Guaranty Trust Company of New York* v. *United States*, 304 U. S. 126; 58 S. Ct. 785, the United States appeared, pleaded and, to all intents and purposes, substituted itself for the Russian Government. After an adverse judgment had been rendered, however, the Government contended that the District Court was without jurisdiction. This Court held that when it came in and submitted to the jurisdiction of the District Court, as has been done in the case at bar, it thereby relinquished its sovereign immunity and became subject to all of the rules of the Court which are applicable to any individual suitor. In the course of the opinion Mr. Justice Stone said:

"By voluntarily appearing in the role of suitor it abandons its immunity from suit and subjects itself to the procedure and rules of decision governing the forum which it has sought. *Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act.* *United States* v. *The Thekla*, 266 U. S. 328, 340, 341, 45 S. Ct. 112, 113, 69 L. Ed. 313; *United States* v. *Stinson*, 197 U. S. 200, 205, 25 S. Ct. 426, 49 L. Ed. 724; *The Davis*, 10 Wall. 15, 19 L. Ed. 875; *The Siren*, 7 Wall. 152, 159, 19 L. Ed. 129. As in the case of the domestic sovereign in like situation, those rules, which must be assumed to be founded on principles of justice applicable to individuals, are to be relaxed only in response to some persuasive demand of public policy generated by the nature of the suitor or of the claim which it asserts." (Italics supplied.)

In the case of *Lowe Brothers Company* v. *United States*, *supra*, in interpreting the amendment of *Section* 24 (20) *of the Judicial Code*, 28 U. S. C. A. 41 (20) Mr. Justice Stone said:

> "The obvious purpose of the amendment was to permit a substitution of a suit against the United States for the suit previously allowed against the collecter whenever the amount claimed exceeds $10,000 and the collector is out of office. . . . "

We interpret this language to mean that whenever the United States appears and answers in the District Court to a petition filed under the amendment, it is shorn of all its sovereign immunities and appears in the personal capacity of the Collector who, as any other individual litigant, could submit himself to the jurisdiction of any Court which has inherent jurisdiction of the subject matter. If such individual appears and answer to the merits of the case without raising any question as to the jurisdiction of the Court over his person, all other objections which do not go to the inherent jurisdiction of the Court are universally held to be waived. If this be true the United States in the personal capacity of the Collector has not only waived its right to object to the jurisdiction of the District Court but is estopped to deny such jurisdiction (1) by its answer, (2) by the admissions made in open Court and (3) by its assent in the bill of exceptions to the effect that "all requisite conditions precedent to the bringing of its petition were complied with by the petitioner".

As to the fourth issue, therefore, it is respectfuly submitted, that as a matter of law, equity and good conscience the Government waived the right to raise its so-called jurisdictional objection by its conduct in the District Court and cannot raise it for the first time in the Appellate Court.

CONCLUSION.

The United States has not been prejudiced in any manner by reason of the fact that the respondent's claim was brought and heard in the District Court instead of in the Court of Claims. The case has been thoroughly and fairly adjudicated. Every issue raised by the Government in those courts was carefully considered in two decisions of the District Court and in three decisions of the United States Circuit Court of Appeals. The original petition contained all of the necessary jurisdictional averments which were expressly admitted or assented to by the Government. Throughout the entire presentation of its case in the various courts below, the respondent, as petitioner below, relied upon those admissions in good faith. When the so-called jurisdictional objection was first raised at the second hearing in the Circuit Court of Appeals, the respondent was not only taken completely by surprise but realized that it had been completely misled and deceived. Since none of the objections were raised in the District Court and all of the necessary jurisdictional facts were expressly admitted the objections were not properly raised in the Circuit Court of Appeals and are not properly raised in this Court. The Government itself concedes that the taxes in controversy were wrongfully collected for the year 1917 and that they were wrongfully credited by the Commissioner of Internal Revenue against outlawed taxes for 1918. It is inequitable for the Government to attempt to disregard and repudiate its own admissions as is being attempted in this case. A great and unconscionable injustice will be inflicted upon this respondent if the Government is allowed to prevail.

The respondent respectfully submits, therefore, (1) that the District Court did have jurisdiction of the case, (2) that the Circuit Court of Appeals did not err in sustaining the

judgment of the District Court and (3) that the decision of the Circuit Court of Appeals should be affirmed by this Honorable Court.

Respectfully submitted,

O. WALKER TAYLOR,
RAY HENRY,
Attorneys for the Respondent.

APPENDIX.

Act of March 3, 1887, c. 359, 24 Stat. 506
Section 5; 28 U. S. C. 762.

"762. PETITION IN SUIT AGAINST UNITED STATES.—The plaintiff in any suit brought under the provisions of section 41, paragraph 20, of this title shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law.

Section 6; 28 U. S. C. 763.

"763. SAME; SERVICE; APPEARANCE BY DISTRICT ATTORNEY. The plaintiff shall cause a copy of his petition filed under section 762 of this title, to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case *to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any* counterclaim, setoff, claim for damages, or *other*

demand or defense whatsoever of the Government in the premises. . . ." (Italics supplied.)

United States Judicial Code, as amended,
Section 24 (5); 25 U. S. C. 41 (5); 36 Stat. 1092

"*Section* 41. (JUDICIAL CODE, SECTION 24, AMENDED.) ORIGINAL JURISDICTION. . . . The District Courts shall have original jurisdiction as follows:

. . . . . .

"(5) CASES UNDER INTERNAL REVENUE, CUSTOMS, AND TONNAGE LAWS.

"*Fifth.* Of all cases *arising under any law providing for internal revenue,* or from revenue from imports or tonnage except those cases arising under any law providing revenue from imports, jurisdiction of which has been conferred upon the Court of Customs Appeals. (R. S. No. 563, par. 5, No. 629, par. 4; Mar. 3, 1911, c. 231, No. 24, par. 5, 36 Stat. 1092.)" (Italics supplied.)

In the case of suits brought under the amendment to the Tucker Act, the Act itself invests the Attorney General of the United States and the District Attorney upon whom the petition is filed with full authority to represent the United States and requires them to file the necessary pleading, 28 U. S. C. 762, 763. The Statute provides:

Section 24 (20); 28 U. S. C. 41 (20); 43 Stat. 972

"*Section* 41. (JUDICIAL CODE, SECTION 24, AMENDED.) ORIGINAL JURISDICTION . . . The District courts shall have original jurisdiction as follows:

. . . . . .

"(20) SUITS AGAINST UNITED STATES . . . Twentieth. Concurrent with the Court of Claims . . . of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally

assessed or collected, or of any penalty claimed to have been collected without authori y or of any sum alleged to have been excessive or in a"y manner wrongfully collected under the internal revenue laws even if the claim exceeds $10,000 if the collector of internal revenue by whom such tax, penalty or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced . . . No suit against the Government of the United S'ates shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made."

United States Revised Statutes, as amended
Section 3226; 26 U. S. C. 156

"156. SUITS FOR RECOVERY OF TAXES WRONGFULLY COLLECTED.—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, . . . No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 3228; 26 U. S. C. 157

"157. CLAIMS FOR REFUNDMENT; LIMITATIONS.—(a) All claims for the refunding or crediting of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have

been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 1065 of this title, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. . . ."

Revenue Act of 1921, 42 Stat. 227

"SEC. 250. . . .

(d) The amount of income, excess-profits, or war profits taxes due under any return made under this Act for the taxable year 1921 . . . or under prior income, excess-profits or war-profits tax Acts, . . . *shall be determined and assessed* within five years after the return was filed, . . . unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax: . . . (Italics supplied.)

Revenue Act of 1924, c. 234, 43 Stat. 253:

"SEC. 277. (a) . . .

(2) The amount of income, excess-profits, and war-profits taxes imposed by . . . the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, *shall be assessed within five years after the return was filed,* and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." (Italics supplied.)

"SEC. 278. . . .

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment, the tax may be asessed at any time prior to the expiration of the period agreed upon."

Revenue Act of 1928, 45 Stat. 874; 26 U. S. C. 2607 and 2609:

"SEC. 607. Effect of expiration of period of limitation against United States: Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

Section 609; 26 U. S. C. A. § 2609:

"SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act."

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 30 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1938.

No. 416

UNITED STATES OF AMERICA,
Petitioner,

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY.

BRIEF AMICUS CURIAE.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Amicus Curiae.

U. S. Law Printing Company, 2817 N. Halsted St., Chicago, Ill.

INDEX.

	Page
Motion for Leave to File Brief Amicus Curiae	1
Brief Amicus Curiae	2
Importance of the Question Presented	3
Both Courts Below Correctly Ruled Suit Was for Recovery of 1917 Taxes and the Statute Clearly Confers Jurisdiction	4
Purpose Behind Statute	6
R. S. 3226 Is Not Jurisdictional	6
Even If R. S. 3226 Is Jurisdictional the Record Shows Compliance	10
It Is Not Necessary That the Collector Do Any Wrong to Authorize Suit Against the United States	10
The Credit Does Not Oust the Jurisdiction of the District Court for the Year of Overpayment	12
The Suit Is Not on an Account Stated	14
The R. S. 3226 Applicable to This Suit and the R. S. 3226 Applicable to the Jaffray Suit Are Radically Different	14
The Making of the Credit Did Not Constitute a Rejection of the 1917 Refund Claim	16
Conclusion	19

AUTHORITIES.

CASES CITED.

Blair v. Oesterlein Machine Co., 275 U. S. 220, 225.... 9

Bonwit Teller & Co. v. U. S., 283 U. S. 258.....17, 18

Booth Fisheries Co. v. Commissioner, 84 F. (2d) 49, 51 13

Bull v. U. S., 295 U. S. 247..... 19

Daube v. U. S., 289 U. S. 367, 372..... 3

Elliott v. Swartwout, 10 Pet. 137..... 10

General Utilities and Operating Co. v. Helvering, 296 U. S. 200 9

G. C. M. 4879, C. B. VII, p. 90..... 5

Harvey Co. v. U. S., 23 F. Supp. 444..... 3

Kendall v. U. S., 12 Pet. 524..... 2

Kentucky Improvement Co. v. Slack, Collector, 100 U. S. 648, 654 10

Leisenring v. U. S., 3 F. Supp. 853; 4 F. Supp. 993; cer. den. 291 U. S. 682.....12, 14

Leonard v. U. S., 71 Ct. Cls. 775..... 15

Lowe Brothers Co. v. U. S., 304 U. S. 302, 305, 306....4, 13

McEachern v. Rose, 302 U. S. 56..... 2

Moore Ice Cream Co. v. Rose, 289 U. S. 373.....5, 10

Moses v. McFarlane, 2 Burroughs, 1005 (86 F. (2d) 233) 11

Parks & Woolsen Machine Co. v. U. S., 58 F. (2d) 868, cer. den. 287 U. S. 634 ..... 5, 12

Retzer v. Wood, Collector, 109 U. S. 185 8

Rock Island R. R. Co. v. U. S., 254 U. S. 141 18

Schwab v. U. S., 70 F. (2d) 34, 35 (C. C. A. 7) 6

Stearns Co. v. U. S., 291 U. S. 54 ..... 2, 10

Staten Island Hygeia Ice & Cold Storage Co. v. U. S., 85 F. (2d) 68 (C. C. A. 2) 17

Tucker v. Alexander, 275 U. S. 228 8

United Shoe Machinery Co. v. White, 87 F. (2d) 363, cer. den. 302 U. S. 768 18

Untermyer v. Bowers, 79 F. (2d) 9 (C. C. A. 2) 5, 14

U. S. Refractories Co. v. Commissioner, 23 B. T. A. 872 5

U. S. v. Atkinson, 297 U. S. 157, 159 9

U. S. v. Bollman, 81 F. (2d) 1009, 1010 9

U. S. v. Emory, Bird, Thayer Realty Co., 237 U. S. 28 ..... 10, 18

U. S. v. Factors & Finance Co., 288 U. S. 89 ..... 11, 18

U. S. v. Felt & Tarrant Mfg. Co., 283 U. S. 269 8

U. S. v. Garbutt Oil Co., 302 U. S. 528 16

U. S. v. Jefferson Electric Mfg. Co., 291 U. S. 386 11

U. S. v. Jones, 131 U. S. 1, 19 4

U. S. v. Michel, 282 U. S. 656 ..... 15, 16

U. S. v. Piedmont Mfg. Co., 89 F. (2d) 296, 300 (C. C. A. 4) 7

U. S. v. Swift & Co., 282 U. S. 486 16

Western Wheeled Scraper Co. v. U. S., 72 F. (2d) 487, 488 (C. C. A. 7) 7

Williamsport Wire Rope Co. v. U. S., 277 U. S. 551 11

TEXT BOOKS CITED.

52 Harvard Law Review, 496, 498 11

Corpus Juris:

Vol. 1, Sec. 82, p. 981 (Actions) 7

Vol. 2, Sec. 223, p. 428, etc. 9

Senate Report No. 665; 72nd Congress, 1st Session, page 57 15

STATUTES CITED.

Constitution of the United States, Article 2, Sec. 3.. 2

Judicial Code:

Sec. 24 (U. S. C. Title 28, Sec. 41) 4

26 U. S. C., Sec. 605 6

26 U. S. C., Sec. 630 (b) 6

26 U. S. C., Sec. 602 (d) 6

Sec. 24 (20) 6

R. S. 3226 6

IN THE

Supreme Court of the United States

October Term, 1938.

No. 416

UNITED STATES OF AMERICA,

Petitioner,

v.

BERTELSEN & PETERSEN ENGINEERING COMPANY.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Comes now the undersigned and moves for leave to file instanter the annexed brief as *Amicus Curiae.*

The requisite consents have been filed with the Clerk.

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Amicus Curiae.

BRIEF AMICUS CURIAE.

In *Stearns Co. v. United States, 291 U. S. 54,* this Court, speaking through Mr. Justice Cardozo, said at page *62:*

> "No one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

The Attorney General applauded this principle in the eulogy of Mr. Justice Cardozo which he recently delivered in this Court. Since the Government accepts the decision below on every point except the authority of the District Court to entertain the case, it concedes in this case that it did two wrongs.

First it did wrong in crediting the 1917 overpayment to an outlawed tax in defiance of the statute prohibiting this action.

Secondly, it did wrong in not refunding the overpayment when the illegality of the credit was called to its attention by the taxpayer, as it is expressly commanded to do by the *Revenue Act of 1928. McEachern v. Rose, 302 U. S. 56.* Inasmuch as it is settled by the Courts below that the statutory law commanded the return of the money to the taxpayer, the Government also disregarded the mandate imposed by *Article 2, Section 3 of the Constitution* upon the executive:

> "He shall take care that the laws be faithfully executed."

(Kendall v. United States, 12 Pet. 524.)

The Government now seeks to keep the money and thus profit by these conceded wrongs. Whether it shall be permitted "to take advantage of its own wrong" is for this Court to decide.

IMPORTANCE OF THE QUESTION PRESENTED.

On page 26 of its brief the Government asks this Court to hold that the credit of a conceded overpayment for one year to an alleged tax for another year ousts the jurisdiction of the District Court. If this Court makes this decision it should do so with a full realization that the statute whereby Congress intended to allow taxpayers to go into their local District Courts is thereby amended to provide that they may only do so at the option of the Commissioner. Furthermore after they do so if the Commissioner believes he will lose the suit he can oust the jurisdiction of the District Court by conceding the overpayment for the year of suit and crediting it to an alleged tax for a later year, which is neither due nor collectible. If the taxpayer then goes into the Court of Claims and sues for the credit, when the taxpayer is about to win that suit and after the time to again go into the District Court has expired, the Commissioner may reverse the credit and hold that the refund of the overpayment is outlawed. In *Harvey Co. v. United States, 23 F. Supp. 444*, the Court of Claims said at page *449:*

> "The Commissioner possessed authority to reverse the credits. *Daube v. United States, 289 U. S. 367, 372.*"

Inasmuch as millions of tax returns are filed each year, not only for income, but for Social Security, Excise and other taxes and taxation has become about the most im-

portant economic factor in the country, the Court should appreciate the consequences of a construction which will force thousands of taxpayers into the Court of Claims, already congested by litigation arising out of the voluminous activities undertaken by the Government in recent years. It will mean not only inconvenience and expense but delay with the resultant accumulation of interest against the Government.

BOTH COURTS BELOW CORRECTLY RULED SUIT WAS FOR RECOVERY OF 1917 TAXES AND THE STATUTE CLEARLY CONFERS JURISDICTION.

Jurisdiction is conferred by *Section 24 of the Judicial Code (U. S. C. Title 28, Sec. 41)*. Since the statute is quoted in the other briefs it need not be requoted here. The words of this statute are plain. They confer jurisdiction if two conditions, and two conditions only, exist. (1) The tax sued for must be paid to a collector. It was here. (2) The collector to whom the tax was paid must be dead or out of office when the suit was begun. *Lowe Brothers Co. v. United States, 304 U. S. 302, 305, 306.* The Collector who collected the tax here was out of office when suit was begun. Hence jurisdiction is patent.

When these conditions exist the statute cannot be construed as conferring any less jurisdiction of a suit for the tax than that which is conferred upon the Court of Claims, without disregarding the words of the statute "concurrent with the Court of Claims." This phrase was construed in *United States v. Jones, 131 U. S. 1, 19.* With reference to the jurisdiction of the District Court and the Court of Claims, it was said:

> "It is clearly the same jurisdiction."

Nor should the District Court be held to have a less jurisdiction of suits to recover tax, where the above requirements of the statute have been met, than that possessed by the Court of Claims without considering the historical truth expressed by the late Mr. Justice Cardozo in *Moore Ice Cream Co. v. Rose, 289 U. S. 373, 382,* in referring to a suit against a collector as:

"A relic of obsolete modes of thought."

See also the discussion in that case. An action against Government officers springs from the maxim, "The King can do no wrong," which was applicable in England but never had any justification here. There the action was allowed by the Judges to protect the liberties of the people. Otherwise there would have been no redress at the time such action was first allowed.

In the two cases now on review, two Circuit Courts of Appeals and two District Court Judges have unanimously ruled that the suit is for the recovery of 1917 taxes and that the year of overpayment is the proper year for which to sue when the overpayment is wrongfully credited to a later year. The same ruling was made in *Untermyer v. Bowers, 79 F. (2d) 9 (C. C. A. 2).* In a case where the credit was void as in the case at bar, it has been affirmatively held by the Court of Claims that suit should be brought for the year of overpayment, not for the year to which credit is made. *Parks & Woolsen Machine Co. v. United States, 58 F. (2d) 868,* cer. den. *287 U. S. 634.* See also *U. S. Refractories Co. v. Commissioner, 23 B. T. A. 872.* See also *G. C. M. 4879, C. B. VII, p. 90.*

We know of no case in which a suit for the year of overpayment has been held not a suit for the proper year and the Government cites no case which so holds.

PURPOSE BEHIND STATUTE.

The purpose behind the statute was to allow taxpayers to litigate claims in their own district. The reasons for this are stated in *Schwab v. United States, 70 F. (2d) 34, 35 (C. C. A. 7)*, where it is said the Court will take judicial notice of them. This policy of allowing taxpayers to litigate taxes in their own home district is further evidenced by the Act creating the Board of Tax Appeals. It is provided by this act that the time and place of the meetings of the Board and its divisions "shall be prescribed by the Chairman with a view to securing a reasonable opportunity to taxpayers to appear before the Board, or any of its divisions with as little inconvenience and expense to taxpayers as practicable." *(26 U. S. C. Sec. 605.)* It is also provided *(26 U. S. C. Sec. 630 (b))* for traveling and other expenses of employes of the Board, and it is provided for expense of the members of the Board *(26 U. S. C. Sec. 602 (d))*. Under this provision the Board holds hearings at various places throughout the country. The Revenue Bureau has recently adopted this same decentralization policy and established offices in various cities of the country with the same authority to settle and close cases which formerly existed only in Washington.

R. S. 3226 IS NOT JURISDICTIONAL.

The jurisdiction of the Court below is not conferred by *R. S. 3226* but by *Section 24 (20) of the Judicial Code. R. S. 3226* is not the statute which gives the consent of the United States to be sued. The statute whereby the United States consented to be sued is *Section 24 (20) of the Judicial Code. R. S. 3226* merely requires a demand

as a condition precedent to a suit consented to by another statute. This Court has said that such a demand "may be insisted upon by the defendant, whether the Collector or the United States," but so far as we can discover, has never said that the statute is jurisdictional.

Statutes requiring a demand as a condition precedent to suit, which may be insisted upon by a defendant, are quite common. It has always been held that the requirements of such a statute may be waived. See *Actions, 1 Corpus Juris, Sec. 82, p. 981.* It has never been held that they are jurisdictional.

In *Western Wheeled Scraper Co. v. United States, 72 F. (2d) 487, 488 (C. C. A. 7)*, the Court said with reference to *R. S. 3226:*

> "As we read this section of the statute, it was intended to save the parties the expense of litigation and give the Commissioner an opportunity to settle controversies before suit is commenced thereon, not for the purpose of conferring jurisdiction upon the courts."

See also *United States v. Piedmont Mfg. Co., 89 F. (2d) 296, 300 (C. C. A. 4).* It is submitted that the decisions of this Court are inconsistent with any other conclusion. For example, *R. S. 3226* expressly provides no suit shall be begun

> "until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provision of the law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof."

The statute clearly states that the claim which it requires to be filed must be filed according to "the regulations of the Secretary of the Treasury." In other

words the requirement that the claim be filed according to the regulations, is a statutory requirement. If this statute were jurisdictional this statutory requirement could not be waived, but in *Tucker v. Alexander, 275 U. S. 228,* this Court held it could be waived. In an opinion by the same Justice in *United States v. Felt & Tarrant Mfg. Co., 283 U. S. 269,* this Court said at page *272:*

> "But in *Tucker v. Alexander* the right of the Government to insist upon compliance with *the statutory requirement* was emphasized. Only because that right was recognized was it necessary to decide whether it could be waived. The court held that it could, and that in that case it had been waived by the stipulation of the collector filed in court. Here there was no compliance with the statute nor was there a waiver of its condition, since the Commissioner had no knowledge of the claim and took no action with respect to it." (Italics ours.)

Again the Court said in that case at page *273,* expressly referring to the statute:

> "Compliance may be dispensed with by waiver as an administrative act."

Further it will be observed that the requirement of *R. S. 3226* that suit be brought within two years of the rejection of a refund claim has nothing to do with any regulation. This Court held in *Retzer v. Wood, Collector, 109 U. S. 185,* that it could be waived and could not be raised in this Court where it was not raised below.

In the case at bar the question now sought to be raised was not raised at the trial of the case. If it had been raised the taxpayer would have been in a position to have

met it. Furthermore the allegation of Paragraph 5 of the petition which alleged the filing of a timely refund claim was expressly admitted. Taxpayer could only understand it was conceded.

The practical consequences of holding that this point cannot be waived but can be suddenly pulled out of the hat by the Government in a Court of Appeals is this: Attorneys who try these cases for the Government are skilled specialists. When a suit is brought the first thing they do is to examine the file to ascertain if there has been compliance with *R. S. 3226.* If there has been, they do not trouble about the matter any more. If there has not been, they plead the point and set it up in defense. On the other hand, attorneys for taxpayers are often not specialists and sometimes try only two or three tax cases in a lifetime. They do not bother to prove points which are not contested at the trial but are expressly admitted. In *General Utilities and Operating Co. v. Helvering, 296 U. S. 200,* this Court said at page *206:*

> "Always a taxpayer is entitled to know with fair certainty the basis of the claim against him. Stipulations concerning facts and other evidence are properly accommodated to issues adequately raised."

To allow the Government to first make such a contention in a Court of Appeals and throw the case out for want of jurisdiction (when the facts admitted below actually exist and if challenged below would have been proved) is to open the way for gross injustice. If the point is not jurisdictional it cannot be made for the first time in an Appellate Court. *United States v. Atkinson, 297 U. S. 157, 159; Blair v. Oesterlein Machine Co., 275 U. S. 220, 225; United States v. Bollman, 81 F. (2d) 1009, 1010; Corpus Juris Secundum, Sec. 223, p. 428* and notes.

EVEN IF R. S. 3226 IS JURISDICTIONAL THE RECORD SHOWS COMPLIANCE.

The record unquestionably shows that claims for refund were on file before the Certificate of Overassessment was issued. This certificate states that these claims were considered. From the legal proposition that the Commissioner could not have legally allowed the overpayment unless these claims were timely and from the fact that he did allow it, a presumption arises that the claims were timely. This presumption was not rebutted. The rule of law applicable here is thus stated in *Stearns v. United States, 291 U. S. 54*, at page *63:*

> "Acts done by a public officer which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter".

This Court cites many cases as authority for this proposition of law. The presumption was not rebutted in this case and it alone disposes of the point.

IT IS NOT NECESSARY THAT THE COLLECTOR DO ANY WRONG TO AUTHORIZE SUIT AGAINST THE UNITED STATES.

It is not necessary that the Collector do any wrong to authorize suit either against him or against the United States. If it is then payments made by honest mistake of fact or law cannot be recovered. As Mr. Justice Holmes, speaking for this Court in *United States v. Emory, Bird, Thayer Realty Company, 237 U. S. 28*, said at page *31:*

> "The right to sue the collector for an unjustified collection was given by the common law".

It was the common law action of *assumpsit. Kentucky Improvement Co. v. Slack, Collector, 100 U. S. 648, 654; Elliott v. Swartwout, 10 Pet. 137.* At common law protest was necessary but as said in *Moore Ice Cream Co. v. Rose, 289 U. S. 373, 379:*

> "A high-minded Government renounced an advantage that was felt to be ignoble and set up a new standard of equity and conscience".

At common law the action of *assumpsit* lay, for payments made by mistake or payments which should not be equitably retained by the person receiving them. Wrongdoing on the part of the defendant was not necessary. See statement of Lord Mansfield in *Moses v. McFarlane, 2 Burroughs, 1005,* quoted in *86 F. (2d)* at page *233,* and *United States v. Jefferson Electric Mfg. Co., 291 U. S. 386,* at pages *402, 403.* In *52 Harvard Law Review, 496, 498,* it pointed out that the absence of obstacles to taxpayers recovering voluntary payments of taxes has the effect of stimulating the payment of taxes and does not put a premium on withholding money from the Government and thus is ultimately to the advantage of the revenue. Hence, we submit that wrongdoing on the part of a Collector is not necessary. The statute conferring jurisdiction quoted on page 29 of petitioner's brief, not only allows an action against a Collector for money "erroneously or illegally" or "wrongfully" collected, but also allows an action for "any sum alleged to have been excessive". The words are in the alternative. Any tax paid above what the law exacts is "excessive".

Nor can anything be made of the point that the original claim was for special assessment. Since the Commissioner allowed it but refused to pay it on other grounds, the case is exactly the same as *United States v. Factors & Finance Co., 288 U. S. 89, 93,* distinguishing the case of *Williamsport Wire Rope Co. v. United States, 277 U. S. 551,* cited by the petitioner.

THE CREDIT DOES NOT OUST THE JURISDICTION OF THE DISTRICT COURT FOR THE YEAR OF OVERPAYMENT.

At the top of page 26 of its brief the Government advances the following proposition:

> "Under such circumstances, we submit that the District Court has no jurisdiction of a suit for the year of original overpayment, and that the proper *forum* is the Court of Claims, in a suit on the year to which the overpayment was applied."

When the taxpayers proceeded on this theory they have been defeated. The Court of Claims in *Parks & Woolsen Machine Co. v. United States, 58 F. (2d) 868;* cer. den. *287 U. S. 634,* held against it and the Government vigorously opposed the taxpayer's petition for the writ of *certiorari* on the ground that this decision was right. Judge Littleton who wrote the opinion in that case in a subsequent dissenting opinion stated he thought it was erroneous. The majority of the Court of Claims has adhered to it. It is interesting to note that as a further argument why this Court should deny the writ of *certiorari* in that case, the Government said in its answer to the petition that taxpayers were "adequately protected," since they could sue on an account stated. When the taxpayers did sue on an account stated the Government reversed this position in its arguments and defeated them and vigorously opposed their petitions for the writ of *certiorari. Leisenring v. United States, 3 F. Supp. 853; 4 F. Supp. 993;* cer. den. *291 U. S. 682,* and numerous other cases. The reports teem with cases on which the Government by one technicality or another has avoided carrying out the plain mandate of Congress that payments made after the limitation should be refunded.

Furthermore in its brief in *Lowe Brothers Co. v. United States, No. 864,* October Term 1937, at pages 11 and 12, the Government vigorously argues that the proper year to bring suit is for the year of the overpayment and not for the year to which the credit is made because the credit is void. Among other things, it says "any other construction of *609* leaves it meaningless."

The record undeniably shows that directly conflicting arguments are made by the Government on the same proposition of law whenever the adoption of these arguments will work to its advantage in the instant case and that these arguments are not confined to the lower Courts but are made here. In *Booth Fisheries Co. v. Commissioner, 84 F. (2d) 49, 51,* the Court said:

> "Taxpayers dealing in good faith with their Government should likewise be accorded the utmost of frankness and good faith."

We emphasize the above unquestionably shows when taxpayers have sued for the year to which the credit was made the Government had argued in court that they should have sued for the year of overpayment. This argument was made by the Government in this Court in the *Lowe Brothers case.* When, taking the Government at its word, they sued for the year of overpayment the Government has then argued that they should have sued for the year to which the credit was made, as it argues in this case. All of these arguments were made to defeat a right clearly given a taxpayer by express statutory mandate! In most enlightened countries they would not succeed.

THE SUIT IS NOT ON AN ACCOUNT STATED.

At pages 24 and 25 of its brief the Government argues that the suit is on an account stated. In the cases cited on page 25 of the Government's brief the Courts dismissed the suits because they were concededly and unquestionably on an account stated, which is a contract suit and District Courts do not have jurisdiction of suits against the United States on contracts where the amount exceeds $10,000.

The contention of the Government that a taxpayer in a case such as this was confined to a suit on an account stated was rejected in *Untermyer v. Bowers, 79 F. (2d) 9, 11;* Government's petition for *certiorari* denied *296 U. S. 641.* The lower Courts have uniformly held in recent years that no account stated exists on the facts shown in this case. *Leisenring v. United States, 3 F. Supp. 853; 4 F. Supp. 993;* cer. den. *291 U. S. 682. Certiorari* has been consistently denied. In other words, the Government says that the suit should be in the Court of Claims on an account stated notwithstanding it knows the Court of Claims has consistently held that no account stated exists in these cases and the taxpayers have been denied *certiorari.*

The petition alleges that the claim was rejected and the answer admits this allegation of fact.

THE R. S. 3226 APPLICABLE TO THIS SUIT AND THE R. S. 3226 APPLICABLE TO THE JAFFRAY SUIT ARE RADICALLY DIFFERENT.

R. S. 3226 was radically amended in 1932, the amendment being declared to be applicable to suits brought after its enactment. The reason for the amendment was this. As *R. S. 3226* read, prior to the 1932 amendment,

a taxpayer who did not sue within five years after payment of the tax had to wait until the Commissioner rejected his claim. He might file a claim just before the limitation on its filing ran and the Commissioner might take several years to consider it. If the Commissioner then refused to disallow or reject it the taxpayer could not sue. *Leonard v. United States, 71 Ct. Cls. 775.* To remedy this the statute was amended to strike out the provision requiring suit to be brought within five years after payment and allowing a taxpayer to sue at any time after his claim had been on file for six months. Another thing accomplished by the amendment was to repeal prospectively the decision of this Court in *United States v. Michel, 282 U. S. 656,* which held that the limitation against a taxpayer started to run when a claim was rejected by the Commissioner, notwithstanding the taxpayer did not know it had been rejected and had no means of learning the exact date on which it was rejected. This Court felt the language of the statute necessitated such a construction and reversed the holding of the Circuit Court of Appeals to the contrary. The statute as amended in 1932 (quoted in the taxpayer's brief in the *Jaffray case* argued herewith) provided that suit should not be begun

> "after the expiration of 2 years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Under this provision the statute of limitations against a taxpayer never started to run until the Commissioner mailed him by registered mail a notice of disallowance. *Senate Report No. 665; 72nd Congress, 1st Session, page 57.* The effect of this amendment was to place no limitation whatever on allowed claims. Congress evidently

considered that allowed claims would and should be paid and that a limitation on the taxpayer's right to sue for them was not necessary or right.

THE MAKING OF THE CREDIT DID NOT CONSTITUTE A REJECTION OF THE 1917 REFUND CLAIM.

United States v. Michel, 282 U. S. 656, held that (prior to the 1932 amendment) a refund claim was rejected when the Commissioner signed a Schedule disallowing it. The Court has doubtless seen schedules disallowing claims in the record of other cases before it in the past. These schedules are headed "Schedule of Rejected Claims Income Tax Unit." Directly above the signature of the Commissioner, they state:

> "The following claims in number for the refunding, abatement or credit of income taxes have been examined and are hereby rejected in full."

When a credit is made the schedule allowing the credit is entirely different. (See record in *United States v. Swift & Co., 282 U. S. 486.)* Credits, abatements and refunds are distinct. This becomes more apparent when the nature of a refund claim is considered. In a refund claim an action cannot be maintained upon a demand for the refund of money. It is the specific facts asserted in the claim which must be made the basis of the action. *United States v. Garbutt Oil Co., 302 U. S. 528.* When the Commissioner considers the specific facts and concedes and allows them he thereby allows the claim and does not deny it. The statute expressly states he allows the refund or the credit when he signs the Schedule allowing or crediting it. Inasmuch as the statute makes this an allowance it cannot be the converse thereof —rejection. The allowance of a claim and its payment are different things. The Commissioner is not author-

ized to draw and sign checks on the Treasury Department, only the Disbursing Clerk can do this. After the Commissioner has allowed the claim his function has ceased.

If the insurance company advises you you have overpaid your premium for 1938 and you ask its refund and they tell you they will grant your claim and credit the overpayment on your 1939 premium, this certainly does not constitute a rejection of your claim. If later it is discovered that all your 1939 premium was not owing because it was overcomputed by mistake, the contention that your 1938 claim was rejected should not be good. Two different years are involved. That is exactly what happened here. The Commissioner believed he had a right to make the credit of an allowed 1917 overpayment to a later year and made it by mistake as the Courts below held. For this mistake see also *Staten Island Hygeia Ice & Cold Storage Co. v. United States, 85 F. (2d) 68 (C. C. A. 2).* The mistake is not as to the 1917 overpayment but as to the collectibility of the later year's tax.

That the credit was not a disallowance of the refund claim for the earlier year was stated by this Court in *Bonwit Teller & Co. v. United States, 283 U. S. 258,* in which the taxpayer's suit was brought in the Court of Claims within two years of the making of the credit. If the making of the credit had constituted a disallowance of the claim the suit having been brought within two years thereof would have been brought in time, under *R. S. 3226.** On page 11 of its brief, the Government said:

* Until 1932 the statute required suit to be brought within two years after disallowance and within five years after payment. If more than five years had passed and suit had not been brought, a disallowance was necessary. In 1932 the statute was amended to do away with the necessity of a disallowance.

> "The clause permitting suit 'within two years after disallowance' of a claim for refund has no application here, since in the instant case the claim for refund was not disallowed."

This Court in its opinion in *283 U. S.*, at page *265*, said:

> "This case is not within the clause giving 2 years after disallowance because here the claim was allowed."

Furthermore if the rejection of a claim for abatement is not the rejection of a claim for refund as held in *Rock Island R. R. Co. v. United States, 254 U. S. 141*, and if the rejection of a claim for abatement made on the same grounds as a then pending claim for refund is not a rejection of the pending claim for refund as held in *United States v. Factors & Finance Co., 288 U. S. 89, 92*, and if a claim for credit is not a claim for refund as held in *United Shoe Machinery Co. v. White, 87 F. (2d) 363*; cer. den. *302 U. S. 768*, it is hard to see how the *allowance* of a credit can constitute a rejection of a refund claim when the rejection of a credit does not.

However, if the refund claim in the case at bar has never been rejected and if the present suit should be dismissed for want of jurisdiction on this account all the taxpayer would have to do is bring another suit in the District Court since *R. S. 3226* as amended in 1932 lays down no limitation on a suit on an allowed claim. In the words of Justice Holmes in the *Emory, Bird, Thayer case*, the "least" that can be said is that this "would be adding a fifth wheel to the coach."

On point is Tucker v Alexander
275 US 228

However, it is not disputed that the Commissioner as held by the Court below, had a right to reconsider his allowance of the claim. When the taxpayer filed his second claim, calling attention to the mistake of the Commissioner and the Commissioner considered it on the merits and rejected this claim, this action was the first rejection of the taxpayer's claim by the Commissioner and suit within two years thereof was timely and a compliance with *R. S. 3226* as it then stood.

CONCLUSION.

If, as this Court has said, "taxes are the life blood of Government" *(Bull v. United States, 295 U. S. 247, 259)*, it follows that taxpayers are the heart of the Government for they pump the taxes into all the arteries of the body politic. They sustain the legislative, the executive and the judicial branches. If they become unable to sustain these branches the Government will end. Hence taxpayers are entitled to every consideration and to have all doubts resolved in their favor and to have a liberal construction of statutes intended for their benefit. In the language of the street they need every "break" they can get.

The sections of the *Revenue Act* now under consideration were clearly intended for their benefit and they should not be so strictly and technically construed as to emasculate them. A decision against one taxpayer is a decision against every taxpayer for whose benefit the legislation is intended.

All of which is respectfully submitted,

JOHN E. HUGHES,
First National Bank Bldg.,
Chicago, Illinois,
Amicus Curiae.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Reasons for granting the writ	5
Conclusion	14
Appendix	15

CITATIONS

Cases:

American Steam Conveyor Corporation v. *United States*, 10 F. Supp. 571, certiorari denied, 296 U. S. 599	12
Bull v. *United States*, 295 U. S. 247	8
Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359	7
Burnet v. *Thompson Oil & G. Co.*, 283 U. S. 301	7
First Nat. Bank of Beaver Falls v. *United States*, 8 F. Supp. 484, certiorari denied, 294 U. S. 717	12
Gans S. S. Line v. *Bowers*, 82 F. (2d) 181, certiorari denied, 298 U. S. 676	12
Graham & Foster v. *Goodcell*, 282 U. S. 409	12
Lowe Bros. Co. v. *United States*, 304 U. S. 302	6, 12
Moore Ice Cream Co. v. *Rose*, 289 U. S. 373	8
Parks & Woolson Mach. Co. v. *United States*, 58 F. (2d) 868, certiorari denied, 287 U. S. 634	12
Standard Oil Co. v. *United States*, 5 F. Supp. 976	8
Tull & Gibbs v. *United States*, 48 F. (2d) 148	8
United States v. *Bertelsen & Petersen E. Co.*, 95 F. (2d) 867, certiorari applied for by the United States, No. 416, Present Term	11
United States v. *Botany Worsted Mills*, decided September 2, 1938 (C. C. A. 3d)	13
United States ex rel. Cole v. *Helvering*, 73 F. (2d) 852	8
United States v. *Felt & Tarrant Co.*, 283 U. S. 269	10, 11
United States v. *John Gallagher Co.*, 83 F. (2d) 368	12
United States v. *Reeves Bros. Co.*, 83 F. (2d) 121, certiorari denied, 299 U. S. 573	12
United States v. *Swift & Co.*, 282 U. S. 468	9, 10
York Safe & Lock Co. v. *United States*, 40 F. (2d) 148	8

103934—38——1

Statutes: Page

Act of March 3, 1875, c. 149, 18 Stat. 481, as amended by Sec. 13, Act March 3, 1923, c. 212, 47 Stat. 1489 (U. S. C., Title 31, Sec. 227) 17

Judicial Code, as amended, Sec. 24 (U. S. C., Title 28, Sec. 41) 16

Revenue Act of 1918, c. 18, 40 Stat. 1057, Sec. 252 8

Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 252 8

Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 281 8

Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 284 8

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 322 8

Sec. 606 (U. S. C., Title 26, Sec. 1660) 18

Sec. 607 (U. S. C., Title 26, Sec. 1670) 19

Sec. 609 (U. S. C., Title 26, Sec. 1675) 19

Revenue Act of 1932, c. 209, 47 Stat. 169

Sec. 321 19

Sec. 322 ..... 8, 29

Revised Statutes:

Sec. 3226 (as amended) (U. S. C., Title 26, Sec. 1672) .. 15

Sec. 3228 (as amended) (U. S. C., Title 26, Sec. 1433) .. 15

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

UNITED STATES OF AMERICA, PETITIONER

v.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above cause on June 29, 1938 (rehearing denied July 25, 1938).

OPINIONS BELOW

The opinion of the District Court (R. 103) is not reported. The opinion of the Circuit Court of Appeals (R. 347) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938 (R. 355). A petition for rehearing was denied July 25, 1938 (R. 358). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where a taxpayer has overpaid taxes for several years, which are allowed as overpayments by the Commissioner of Internal Revenue and then credited by him against taxes for other years, the amount thereof being in excess of $10,000, whether the District Court may entertain a suit for refund for the years of original overpayment.

2. Whether it is a jurisdictional prerequisite that a claim for refund shall have been filed setting forth as a ground of recovery the alleged erroneous assessments or untimely collections for the years to which the overpayments were credited.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*, pp. 15-21.

STATEMENT

This action was instituted in the District Court of the United States for the District of Minnesota by the trustees of the estate of Minnesota and Ontario Paper Company, a corporation, hereinafter referred to as the taxpayer, against the

United States to recover internal revenue taxes in the amount of $118,727.61, with interest (R. 1, 14).

Among other things, the petition alleges the filing of income tax returns for the years 1922, 1923, 1924, and 1925, the payment of taxes for those years to the Collector of Internal Revenue then in office, who was out of office at the date the present action was instituted, and the filing of claims for refund of certain of the taxes for each of those years (R. 1, 2–4). The petition alleges that the claims for refund were disallowed to the extent indicated in certain certificates of overassessment (R. 4), but it further alleges that by these certificates of overassessment the Commissioner of Internal Revenue determined overpayments for each of the years 1922 to 1925, inclusive, covering the amounts here in suit, which he credited against taxes claimed by him to be owing for the years 1921, 1926, 1927, 1928, 1930, and 1931 (R. 5–6). Attached to the petition, and by reference made a part thereof, was an agreement under Section 606 of the Revenue Act of 1928, finally agreeing, among other things, to the principal tax liability for the years 1922 to 1925, inclusive (R. 6, 23–25). The petition alleges that the credits applied against the years 1921, 1926, 1927, and 1928 were erroneous and unlawful for reasons set forth at length in the petition relating to the correct tax liability for the years 1926, 1927, and 1928 (R. 6–12) and the collectibility of the tax for 1921 when the credits were made (R. 12–14). There was no allegation that claims for

refund had been filed for the years 1921, 1926, 1927, and 1928 for the amounts which were alleged by the taxpayer to have been collected and satisfied for those years by credit of the overpayments from the years 1922 to 1925, inclusive.[1]

A demurrer filed by the United States (R. 52) was overruled (R. 68–70), and a motion to dismiss filed by the United States (R. 130) was denied and exception noted (R. 132). At the conclusion of the evidence the motion of the United States for judgment was denied and exception noted (R. 265).

The District Court made findings of fact (R. 77–97) and conclusions of law (R. 97–103). It construed the proceeding as brought for the recovery of overpayments of taxes for each of the years 1922 to 1925, inclusive, and 1928,[2] and held that the Court had jurisdiction thereof (R. 97, 103–110). On the merits it held substantially for the taxpayer (R. 98–103, 110–127). On appeal it was held that suit was maintainable to recover the overpayments for the years 1922 to 1925, inclusive. The judgment of the District Court on the merits was modified and affirmed.

---

[1] It was alleged that a claim for refund for $7,758.58 paid in cash to the Collector was filed for the year 1928, prior to the date the credit was made, but the computations of the District Court (R. 126) show that this amount was properly owing from the taxpayer for 1928, and the taxpayer conceded this in the court below.

[2] See footnote (1) *supra*.

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that this suit was maintainable as one to recover the overpayments which were admittedly made to the Collector by the taxpayer for the years 1922 to 1925, inclusive.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of Federal law which has not been but should be settled by this Court.

By a definitive agreement under Section 606 of the Revenue Act of 1928 the Commissioner of Internal Revenue agreed with the taxpayer as to its liability for taxes for the years 1922 to 1925, inclusive. Thereafter the Commissioner issued certificates of overassessment for those years determining overpayments for each year, which overpayments were credited by the Commissioner against outstanding assessments of taxes for the years 1921, 1926, 1927, 1928, 1930, and 1931.* The present suit was brought to recover the overpayments for the years 1922 to 1925.

Concededly, the taxpayer could not have brought a suit in the District Court for the years 1921, 1926,

*The taxes for 1921 in the amount of $30,810.46 were satisfied entirely from interest on the overpayment for the years 1922 to 1925.

1927, and 1928,[4] because, first, it had filed no claims for refund for those years, and second, the collection, if any, for those years, which exceeded $10,000, was made by the Commissioner by the credit from the overpayments for 1922 to 1925 and hence no suit would lie in the District Court against either the Collector or the United States. *Lowe Bros. Co.* v. *United States*, 304 U. S. 302.

It is evident, however, from a reading of the taxpayer's complaint that although the action purports to be for the years 1922 to 1925, the only questions raised by it relate to the correctness of the assessments and collections for the years 1921, 1926, 1927, and 1928.[5] There was no controversy over taxes for 1922 to 1925, inclusive.[6] It had theretofore been agreed between the taxpayer and the Commissioner of Internal Revenue that the taxpayer had overpaid its taxes for those years and the Commissioner, as required by law, had credited these overpayments against outstanding assess-

[4] The taxpayer admitted that the taxes assessed for 1930 and 1931 were proper, and therefore did not attack the credits made to those years.

[5] In this petition for certiorari, the Government does not dispute the holding of the court below that the deficiencies for 1926, 1927, and 1928 were in part erroneous, although it believes that this holding was incorrect. Also, the Government concedes that the deficiency for 1921 was barred from collection at the time of the credit.

[6] This is emphasized by the fact that the taxpayer had prior to the institution of the present suit dismissed *with prejudice* an earlier suit for refund of 1922 taxes (R. 265, 266).

ments for other years, including the years 1921 and 1926, 1927, and 1928. The question, then, is whether in such circumstances, by purporting to state a cause of action based upon the original wrongful collection by a Collector and an alleged failure of the Commissioner to refund, a taxpayer may litigate, over the objection of the Government, the merits of tax assessments and collections for other years without complying with those provisions of law, the adherence to which would be indispensable to a suit for such other years.

This question has two aspects:

(a) Whether a proper cause of action against the United States in the District Court for more than $10,000 may be grounded upon an original erroneous collection of taxes by a collector where the Commissioner has determined the overpayment and has applied it against taxes assessed against the taxpayer for other years, and (b) whether in any event, it is a jurisdictional prerequisite in such circumstances that a timely claim for refund be filed presenting the facts forming the ground of recovery, namely, facts showing erroneous assessments or improper collections for the years to which the overpayments were credited.

(a) It is, of course, well settled that each taxable year is treated as a unit. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301, 306. The assessment of taxes for each year has the force of a judgment.

After assessment, taxes are "then due" from the taxpayer regardless of the correctness of the assessment. See *Bull* v. *United States*, 295 U. S. 247, 259–260.

If an assessment of taxes is not paid after demand, administrative officials may seize the debtor's property to satisfy the debt. However, where the determinations by the Commissioner of an overpayment for one year and an unpaid assessment for another year exist contemporaneously, a taxpayer cannot insist that the overpayment be refunded to it in cash and the unpaid assessment collected separately, by distraint or some other proceeding. The Revenue Acts have uniformly provided that where there has been an overpayment of tax the amount of such overpayment "shall be credited" against other taxes then due from the taxpayer and any balance refunded.[7] The courts have construed this provision as giving the Commissioner the absolute right to make a credit, at least where there is no question about the collection of the deficiency being barred.[8] The right to sue the United States being statutory, as is also the right to sue a Collector (see *Moore Ice Cream Co.* v.

[7] Sec. 252, Revenue Acts of 1918 and 1921; Sec. 281 (a) Revenue Act of 1924; Sec. 284 (a) Revenue Act of 1926; Sec. 322 (a) Revenue Acts of 1928 and 1932.

[8] *York Safe & Lock Co.* v. *United States*, 40 F. (2d) 148 (C. Cls.); *Standard Oil Co.* v. *United States*, 5 F. Supp. 976 (C. Cls.); *United States ex rel. Cole* v. *Helvering*, 73 F. (2d) 852 (App. D. C.); *Tull & Gibbs* v. *United States*, 48 F. (2d) 148 (C. C. A. 9th).

Rose, 289 U. S. 373), a cause of action cannot exist where there has been exact compliance with statutes by Government officials. Here, certainly as to the deficiencies for 1926, 1927, and 1928, there can be no question but that the Commissioner adhered strictly to his statutory duty. True, the taxpayer had overpaid its taxes for each of the years 1922 to 1925, inclusive, but the Commissioner had agreed as to that and had disposed of the money as the statutes required him to dispose of it.

This does not mean, of course, that the taxpayer was left without a remedy. As alleged by it below, the crediting of the overpayments for 1922 to 1925 against the assessments for 1921, 1926, 1927, and 1928 constituted a collection and satisfaction of the taxes for the latter years. If proper claims for refund had been filed for these latter years, suit, at least as to the years 1926, 1927, and 1928, could unquestionably have been brought thereon in the Court of Claims. *United States* v. *Swift & Co.*, 282 U. S. 468. In the *Swift* case there was a credit of an overpayment of tax for one year against an erroneous deficiency for another year. This Court sustained a suit brought in the Court of Claims for the year of the deficiency, the principal question being whether a timely claim for refund for the year of the deficiency had been filed. This Court held (p. 476) that the claim for refund "was filed within four years of the payment of the tax, since that payment must be taken to have occurred on

the date of the allowance of the credit by the Commissioner's signature approving the schedule of refunds and credits." It would seem necessarily to follow as a corollary to the *Swift* case that if there was a payment of the tax for the year of the deficiency by virtue of the credit there was a corresponding disposition to and for the use and benefit of the taxpayer of the amount of the overpayment in the year of overpayment, and hence that no suit could be brought for the year of the original overpayment, for the Government would no longer have in its hands money to which the taxpayer would be equitably entitled for that year. Since taxable years are treated as separate and distinct units, it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years.

(b) Furthermore, the filing of a claim for refund setting forth the grounds which may later be asserted by suit is a jurisdictional requirement. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269. Here the ground of suit was the alleged wrongful retention of taxes overpaid for 1922 to 1925 because of an asserted erroneous and unlawful application of the overpayments to taxes for other years. The real point in issue was the correctness of the assessments and collection for those other years, not whether the taxes had been overpaid for 1922 to 1925. No claim for refund asserting that the assessments and collections for 1921, 1926, 1927, and 1928 were incorrect was ever filed. The deci-

sion below is therefore in substantial conflict with this Court's decision in *United States* v. *Felt & Tarrant Co., supra.*

2. If, as was held by this Court in the *Swift* case, *supra,* the crediting of an overpayment of tax for one year against an erroneous deficiency for another year constitutes a collection and payment of the tax for the year of the deficiency, and if such a collection or payment, that is, the use of the money paid by the taxpayer for one year to satisfy an obligation of the taxpayer for another year, precludes the taxpayer from maintaining a suit on the original year of overpayment, the further question is presented in the case at bar as to the effect of Sections 607 and 609 of the Revenue Act of 1928, *infra,* p. 19, which provide that any credit against a deficiency barred from collection "shall be void." This question relates only to one of the four years involved here, namely, the year 1921. There exists at present a conflict between the Circuit Court of Appeals for the First Circuit and the Court of Claims on the one hand and the Circuit Courts of Appeals for the Second and Sixth Circuits on the other, as to whether Sections 607 and 609 of the Revenue Act of 1928, *infra,* p. 19, prevent a credit of an overpayment for one year to a barred deficiency for another year from being considered a collection of the tax for the year of the deficiency, and hence corresponding confusion as to the proper year for suit. See *United States* v. *Bertelsen & Petersen E. Co.,* 95 F. (2d) 867 (C. C. A. 1st), in

which application for a writ of certiorari has been filed by the United States, No. 416, present Term. See also *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th); *United States* v. *Reeves Bros. Co.*, 83 F. (2d) 121, 122 (C. C. A. 6th), certiorari denied, 299 U. S. 573; *Gans S. S. Line* v. *Bowers*, 82 F. (2d), 181, 183 (C. C. A. 2d), certiorari denied, 298 U. S. 676. Cf. *Parks & Woolson Mach. Co.* v. *United States*, 58 F. (2d) 868 (C. Cls.), certiorari denied, 287 U. S. 634; *First Nat. Bank of Beaver Falls* v. *United States*, 8 F. Supp. 484, 487–488 (C. Cls.), certiorari denied, 294 U. S. 717; *American Steam Conveyor Corporation* v. *United States*, 10 F. Supp. 571 (C. Cls.), certiorari denied, 296 U. S. 599. Cf. also *Graham & Foster* v. *Goodcell*, 282 U. S. 409, 424. The question was left open by this Court in *Lowe Bros. Co.* v. *United States, supra.* In the present case the District Court stated (R. 107) that it was difficult to perceive any substantial distinction between an application of an overpayment to a barred deficiency and the application of an overpayment to a deficiency which did not in fact exist. The Circuit Court of Appeals did not discuss the point.

The confusion which existed as to the effect of credits against barred deficiences has been added to by the decision below, which involves both a barred deficiency and non-barred but allegedly erroneous deficiencies. A review by this Court of

the case would aid substantially in dispelling the confusion and furthering the orderly disposition of future cases.

3. The decision below is also in conflict with the holding in *United States* v. *Botany Worsted Mills*, decided by the Circuit Court of Appeals for the Third Circuit on September 2, 1938, not yet reported but found in 1938 C. C. H., Vol. 4, ¶ 9492, that the credit there involved of an overpayment of tax for 1918 against a deficiency for 1917 "must be regarded as a valid final closing of the accounts between the Government and the taxpayer so far as the overpayment of 1918 tax was concerned." That was a suit to recover interest on an overpayment of taxes for the year 1918 which had been credited against an assessment of taxes for the year 1917. The assessment for 1917 was later determined to be erroneous, and the amount collected by the credit was refunded, with interest from the date of the credit. The suit sought additional interest from the date of the original payment for 1918 to the date of credit. The Circuit Court of Appeals denied recovery on the ground, among others, that the legal effect of the credit was a payment by the Government to the taxpayer of the 1918 tax refundable to it and a simultaneous payment by the taxpayer to the Government of the same amount on account of its then outstanding tax assessment for 1917, closing out completely the year 1918.

CONCLUSION

The decision of the court below is erroneous. There is a conflict of decisions among Circuits. The question presented is important and the law with regard thereto is in confusion. Wherefore it is respectfully submitted that this petition should be granted.

ROBERT H. JACKSON,
Solicitor General.

OCTOBER 1938.

APPENDIX

STATUTES INVOLVED

Revised Statutes:

SEC. 3226 (as amended by Section 1103 (a) of the Revenue Act of 1932): No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672.)

SEC. 3228 (as amended by Section 1106 (a) of the Revenue Act of 1932): (a) All claims for the refunding or crediting of any inter-

nal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund. * * * (U. S. C., Title 26, Sec. 1433.)

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, * * *; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue

by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. * * * All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Act of March 3, 1875, c. 149, 18 Stat. 481, as amended by Title II, Sec. 13, Act of March 3, 1933, c. 212, 47 Stat. 1489:

That when any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted

to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff. (U. S. C., Title 31, Sec. 227.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 606. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) *Finality of agreements.*—If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance there-

with, shall not be annulled, modified, set aside, or disregarded.

* * * * *

(U. S. C., Title 26, Sec. 1660.)

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (U. S. C., Title 26, Sec. 1670.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607. (U. S. C., Title 26, Sec. 1675.)

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608. (U. S. C., Title 26, Sec. 1675.)

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act.

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against

the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in Section 322.

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(c) *Effect of petition to board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment found by board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

(e) *Tax withheld at source.*—For refund or credit in case of excessive withholding at the source, see section 143 (f).

U. S. GOVERNMENT PRINTING OFFICE: 1939

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	5
Argument:	
I. The credit by the Commissioner of Internal Revenue of portions of the allowed overpayments of taxes for 1922 to 1925 against nonbarred deficiencies assessed for 1926, 1927, and 1928 precludes suit in the District Court for the years 1922 to 1925, to recover such portions even though it be conceded that the deficiencies were in part erroneous	7
II. If Section 609 of the Revenue Act of 1928 does not require that a credit to a barred deficiency be considered a nullity, the credit by the Commissioner of portions of the overpayments of taxes for 1922 to 1925, against the barred deficiency for 1921 precludes suit in the District Court for the years 1922 to 1925 to recover such portions	28
Conclusion	38
Appendix	40

CITATIONS

Cases:	
American Steam Conveyor Corp. v. *United States*, 10 F. Supp. 571, certiorari denied, 296 U. S. 599	31
American Woolen Co. v. *United States*, 18 F. Supp. 783, 21 F. Supp. 125, 1021	20
Atlantic Coast Line v. *Florida*, 295 U. S. 301	34
Bachus v. *United States*, 59 F. (2d) 242, certiorari denied, 288 U. S. 610	14
Bowers v. *N. Y. & Albany Co.*, 273 U. S. 346	36
Bull v. *United States*, 295 U. S. 247	10
Burnet v. *Sanford & Brooks Co.*, 282 U. S. 359	9
Burnet v. *Thompson Oil & G. Co.*, 283 U. S. 301	9
Cerro de Pasco Copper Corp. v. *United, States* 13 F. Supp. 229.	18
Ewell v. *Daggs*, 108 U. S. 143	34
First Nat. Bank of Beaver Falls v. *United States*, 8 F. Supp. 484, certiorari denied, 294 U. S. 717	31
Foundation Co. v. *United States*, 15 F. Supp. 229	18

Cases—Continued. Page

Gans S. S. Line v. *Bowers*, 82 F. (2d) 181, certiorari denied, 298 U. S. 676 30

Globe Gazette Printing Co. v. *United States*, 13 F. Supp. 422 .. 18

Graham v. *duPont*, 262 U. S. 234 35

Graham & Foster v. *Goodcell*, 282 U. S. 409 30

Hammond-Knowlton v. *Hartford Connecticut Trust Co.*, 89 F. (2d) 175, certiorari denied, 302 U. S. 707 23

Helvering v. *Newport Co.*, 291 U. S. 485 33

Libby, McNeill & Libby v. *United States*, 9 F. Supp. 673 ... 22

Lowe Bros. Co. v. *United States*, 304 U. S. 302 ..... 8, 22, 29

McEachern v. *Rose*, 302 U. S. 56 36

Mellon v. *Mertz*, 82 F. (2d) 872, certiorari denied, 299 U. S. 548 35

Moses v. *United States*, 61 F. (2d) 791, certiorari denied, 289 U. S. 743 23

Myers v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 17

Parks & Woolson Mach. Co. v. *United States*, 58 F. (2d) 868, certiorari denied, 287 U. S. 634 31

Petroleum Exploration, Inc. v. *Public Service Commission*, 304 U. S. 209 17

Standard Oil Co. v. *United States*, 5 F. Supp. 976, certiorari denied, 293 U. S. 599 11

Stearns Co. v. *United States*, 291 U. S. 54 35

Stone v. *White*, 301 U. S. 532 36

Tozaway Mills v. *United States*, 61 C. Cls. 363 ..... 32, 36

Trojan Powder Co. v. *United States*, 13 F. Supp. 61 18

Tull & Gibbs v. *United States*, 48 F. (2d) 148 12

United States v. *Andrews*, 302 U. S. 517 ..... 17, 25

United States v. *Bertelsen & Petersen E. Co.*, No. 416, present Term 15, 31, 34

United States v. *Botany Worsted Mills*, 98 F. (2d) 880 19

United States v. *Felt & Tarrant Co.*, 283 U. S. 269 ..... 17, 25

United States v. *John Gallagher Co.*, 83 F. (2d) 368 30

United States v. *Garbutt Oil Co.*, 302 U. S. 528 ..... 17, 25

United States v. *Michel*, 282 U. S. 656 13

United States v. *Reeves Bros. Co.*, 83 F. (2d) 121, certiorari denied, 299 U. S. 573 30

United States v. *Swift & Co.*, 282 U. S. 468 ..... 18, 19

United States ex rel. Cole v. *Helvering*, 73 F. (2d) 852 11

United States ex rel. Girard Trust Co. v. *Helvering*, 301 U. S. 540 21

Untermyer v. *Bowers*, 79 F. (2d) 9, certiorari denied, 296 U. S. 641 ..... 27, 28

Woolner Distilling Co. v. *United States*, 62 F. (2d) 228 11

York Safe & Lock Co. v. *United States*, 40 F. (2d) 148 11

Statutes:

Act of March 3, 1875, c. 149, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, 47 Stat. 1489, Sec. 13 .. 42

Statutes—Continued.	Page
Judicial Code, as amended:	
Sec. 24 (U. S. C., Title 28, Sec. 41)	41
Revenue Act of 1918, c. 18, 40 Stat. 1057:	
Sec. 252	11
Revenue Act of 1921, c. 136, 42 Stat. 227:	
Sec. 252	11
Revenue Act of 1924, c. 234, 43 Stat. 253:	
Sec. 274 (a)	10
Sec. 274 (c)	10
Sec. 281 (a)	11
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 284 (a)	11
Sec. 1106	32
Revenue Act of 1928, c. 852, 45 Stat. 791:	
Sec. 322 (a)	11
Sec. 606 (U. S. C., Title 26, Sec. 1660)	43
Sec. 607 (U. S. C., Title 26, Sec. 1670)	29, 34, 44
Sec. 609 (U. S. C., Title 26, Sec. 1675)	33, 44
Sec. 612	32
Revenue Act of 1932, c. 209, 47 Stat. 169:	
Sec. 321	44
Sec. 322	45
Revised Statutes:	
Sec. 3226 (U. S. C., Title 26, Sec. 1672–1673)	40
Sec. 3228 (U. S. C., Title 26, Sec. 1433)	40
Miscellaneous:	
H. Doc. No. 139, 70th Cong., 1st Sess., p. 16	33
H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34	46
S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42	32, 48

In the Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

THE UNITED STATES OF AMERICA, PETITIONER

v.

C. T. JAFFRAY, R. H. M. ROBINSON AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 103) is not reported. The opinion of the Circuit Court of Appeals (R. 346) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938 (R. 355). A petition for rehearing was denied July 25, 1938 (R. 358).

The petition for a writ of certiorari was filed October 25, 1938, and was granted November 21, 1938. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Where a taxpayer has overpaid taxes for several years, which are allowed as overpayments by the Commissioner of Internal Revenue and then credited by him against taxes for other years, the amount thereof being in excess of $10,000, whether the District Court may entertain a suit for refund for the years of original overpayment.

2. Whether it is a jurisdictional prerequisite that a claim for refund shall have been filed setting forth as a ground of recovery the alleged erroneous assessments or untimely collections for the years to which the overpayments were credited.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra,* pp. 40–51.

STATEMENT

This action was instituted on August 29, 1934, in the District Court of the United States for the District of Minnesota by the trustees of the estate of Minnesota and Ontario Paper Company, a corporation, hereinafter referred to as the taxpayer, against the United States to recover internal rev-

enue taxes in the amount of $118,727.61, with interest (R. 1, 14).

The petition alleges, *inter alia,* the filing of income tax returns for the years 1922, 1923, 1924 and 1925, the payment of taxes for those years to the collector of internal revenue then in office, who was out of office at the date the present action was instituted, and the filing of claims for refund of certain of the taxes for each of those years (R. 1, 2–4). The petition alleges that the claims for refund were disallowed to the extent indicated in certain certificates of overassessment (R. 4), but it further alleges that by these certificates of overassessment the Commissioner of Internal Revenue determined overpayments for each of the years 1922 to 1925, inclusive, covering the amounts here in suit, which he credited against taxes claimed by him to be owing for the years 1921, 1926, 1927, 1928, 1930 and 1931 (R. 5–6). Attached to the petition, and by reference made a part thereof, was an agreement under Section 606 of the Revenue Act of 1928, finally agreeing, among other things, to the principal tax liability for the years 1922 to 1925, inclusive (R. 6, 23–25). The petition alleges that the credits applied against the years 1921, 1926, 1927 and 1928 were erroneous and unlawful for reasons set forth at length in the petition relating to the correct tax liability for the years 1926, 1927 and 1928 (R. 6–12) and the correctness and collectibility of the tax for 1921 when the credits were

made (R. 12–14). There was no allegation that claims for refund had been filed for the years 1921, 1926, 1927 and 1928 for the amounts which were alleged by the taxpayer to have been collected and satisfied for those years by credit of the overpayments from the years 1922 to 1925, inclusive.[1]

A demurrer filed by the United States (R. 52) was overruled (R. 68–70), and a motion to dismiss filed by the United States (R. 130) was denied and exception noted (R. 132). At the conclusion of the evidence the motion of the United States for judgment (R. 265, 315) was denied and exception noted (R. 326).

The District Court made findings of fact (R. 77–97) and conclusions of law (R. 97–103). It construed the proceeding as brought for the recovery of overpayments of taxes for each of the years 1922 to 1925, inclusive, and 1928,[2] and held that the court had jurisdiction thereof (R. 97, 103–110). On the merits it held substantially for the taxpayer (R. 98–103, 110–127). On appeal it was held that suit was maintable to recover the overpayments for the years 1922 to 1925, inclusive. The judgment of the District Court on the merits was modified and affirmed. A petition for a writ of certiorari filed

[1] It was alleged that a claim for refund for $7,758.58 paid in cash to the collector was filed for the year 1928, prior to the date the credit was made, but the computations of the District Court (R. 126) show that this amount was properly owing from the taxpayer for 1928, and the taxpayer conceded this in the court below.

[2] See footnote 1, *supra*.

by the United States on October 25, 1938, was granted on November 21, 1938 (R. 360).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that this suit was maintainable as one to recover the overpayments which were admittedly made to the collector by the taxpayer for the years 1922 to 1925, inclusive.

2. The court below erred in not directing dismissal of the cause for lack of jurisdiction.

SUMMARY OF ARGUMENT

The complaint alleges that by an agreement under Section 606 of the Revenue Act of 1928 the Commissioner of Internal Revenue agreed with the taxpayer as to its liability for taxes for the years 1922 to 1925, inclusive; that thereafter the Commissioner issued certificates of overassessment for those years determining overpayments for each year, which overpayments were credited by the Commissioner against outstanding assessments of taxes for the years 1921, 1926, 1927, 1928, 1930 and 1931; that the credits to the years 1926, 1927 and 1928, each in excess of $10,000, were erroneous and unlawful for reasons set forth at length in the complaint going to the correctness of the assessments for the latter years; and that the credit to the year 1921, which was in excess of $10,000, was erroneous and unlawful for reasons set forth in the complaint

going to the correctness and collectibility of the assessment for 1921 at the date of the credit.

The court below sustained the suit as one brought to recover the overpayments for 1922 to 1925, inclusive. On the merits it held that the assessments for 1926, 1927 and 1928 were partially erroneous. The Government conceded in the Circuit Court of Appeals that the 1921 assessment was barred from collection at the date of credit.

We submit that the suit may not be maintained as one for the years of overpayment, 1922 to 1925, inclusive.

Different taxable years are treated as separate and distinct units. When an assessment of taxes has been made, taxes for that year are "then due". Where an overpayment of taxes for one year has been determined, there is a statutory duty upon the Commissioner to credit the overpayment against any taxes then due, and to refund any balance to the taxpayer. Here the directions of the statute have been explicitly followed, and the taxpayer does not argue to the contrary. The United States has not consented to be sued for the recovery of an overpayment of tax where, as here, that overpayment has been disposed of as required by statute.

Although the taxpayer construes its suit as brought to recover part of the overpayments for the years 1922 to 1925, inclusive, the real purpose of the suit is to litigate the merits and collectibility of taxes for other years. Tested by the objective

sought to be attained, the suit is therefore one for the years of the deficiencies. Concededly the District Court could not have entertained the suit as one for the years of the deficiencies, because for each of those years the taxes exceeded $10,000 and their collection was not by a collector of internal revenue, but by the Commissioner in making the credit. Furthermore, the filing of claims for refund for those years was a condition precedent to suit, and no claims for those years were filed.

In addition, no claims for refund were filed for the original years of overpayment containing the grounds relied on in the present suit, namely, the alleged erroneous and illegal assessment and collection of taxes for the years of the deficiencies. Such claims were jurisdictional prerequisites to suit.

The District Court should be held to be without jurisdiction to entertain the suit insofar as it relates to the credit to the barred deficiency for 1921 for the same reasons that it is without jurisdiction as to the credits to the non-barred deficiencies.

ARGUMENT

I

THE CREDIT BY THE COMMISSIONER OF INTERNAL REVENUE OF PORTIONS OF THE ALLOWED OVERPAYMENTS OF TAXES FOR 1922 TO 1925 AGAINST NONBARRED DEFICIENCIES ASSESSED FOR 1926, 1927, AND 1928 PRECLUDES SUIT IN THE DISTRICT COURT FOR THE YEARS 1922 TO 1925, TO RECOVER SUCH PORTIONS EVEN THOUGH IT BE CONCEDED THAT THE DEFICIENCIES WERE IN PART ERRONEOUS

By an agreement under Section 606 of the Revenue Act of 1928, the Commissioner of Internal

Revenue agreed with the taxpayer as to its liability for taxes for the years 1922 to 1925, inclusive. Thereafter the Commissioner issued certificates of overassessment for those years determining overpayments for each year, which overpayments were credited by the Commissioner against outstanding assessments of taxes for the years 1921, 1926, 1927, 1928, 1930 and 1931. The present suit was brought to recover the overpayments for the years 1922 to 1925.

Concededly, the taxpayer could not have brought a suit in the District Court f r the years 1926, 1927 and 1928,[*] because, first, it h. d filed no claims for refund for those years, and second, the collection for those years, which exceeded $10,000 for each year, was made by the Commissioner by the credit from the overpayments for 1922 to 1925, and hence no suit would lie in the District Court against either the collector or the United States. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302.

It is evident, however, from a reading of the taxpayer's complaint that although the action purports to be for the years 1922 to 1925, there was no controversy over taxes for those years. The Commissioner had agreed that the taxes for those years had been overpaid and had credited them pursuant to the statutory mandate against outstanding assessments for other years. The only questions

[*] The taxpayer admitted that the taxes assessed for 1930 and 1931 were proper, and therefore did not attack the credits made to those years.

raised by the complaint relate to the correctness of the assessments and collections for those other years. Thus the taxpayer, under the guise of suing for one year, attempts to litigate, over the objection of the Government, the merits of tax assessments and collections for other years in a forum which does not have jurisdiction to entertain suit for those other years and without complying with a further jurisdictional condition of suit for those other years, namely, the filing of claims for refund. This, we submit, the taxpayer may not do.

(1) It is, of course, well settled that each taxable year is treated as a unit. *Burnet* v. *Sanford & Brooks Co.*, 282 U. S. 359; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301, 306. It is the essence of our system of taxation that it should produce revenue ascertainable, and payable to the Government, at regular intervals, for only by such a system is it practicable to produce a regular flow of income and apply methods of accounting, assessment, and collection capable of practical operation. *Burnet* v. *Sanford & Brooks Co., supra,* p. 365. To meet the needs of government, the usual procedure for the recovery of debts is reversed in the field of taxation. Payment may be required to precede defense. An assessment of taxes is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt. After assessment, taxes are "then due" from the taxpayer re-

gardless of the correctness of the assessment. *Bull* v. *United States*, 295 U. S. 247, 259–260.

Until the passage of the Revenue Act of 1924, a taxpayer who disagreed with administrative officers that additional taxes were due from it could pursue but one course to have that question adjudicated, that is, pay the tax, file a claim for refund, and, upon the expiration of six months or the rejection of the claim, sue in the courts. The Revenue Act of 1924, however, set up an administrative body, the Board of Tax Appeals, to which appeals from the determination of deficiencies could be taken prior to payment. Under that Act notice of the determination of a deficiency must be transmitted to the taxpayer, and an opportunity allowed for appeal. During the period in which an appeal may be taken, assessment of the tax is forbidden.[4] However, if, as in the present case, no appeal from a deficiency is taken to the Board of Tax Appeals, the deficiency "shall be assessed, and shall be paid upon notice and demand from the collector."[5] Thus now, as formerly, when taxes are once assessed, they must be paid prior to a suit to test the correctness of the exaction. Though the taxpayer may have overpaid taxes for other years and though the Government might still have in its hands money to which the taxpayer would be entitled for those years, it must nevertheless pay an assessment when demand is made.

---

[4] Section 274 (a), Revenue Act of 1924, c. 234, 43 Stat. 253.
[5] Section 274 (c), Revenue Act of 1924, c. 234, 43 Stat. 253.

Demand for payment in cash of an outstanding assessment, however, will not be made where the taxpayer has overpaid taxes for another year and its liability for that year has been adjusted and the overpayment determined, for in such circumstances the statutes have provided a specific means of collection, that is, by credit of the overpayment against the assessed deficiency. Section 322 (a) of the Revenue Act of 1932, *infra*, p. 45, provides that—

> Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.*

It has been held that the provision of the statutes that an overpayment shall be credited against any tax due is mandatory. *York Safe & Lock Co.* v. *United States*, 40 F. (2d) 148, 153 (C. Cls.); *Woolner Distilling Co.* v. *United States*, 62 F. (2d) 228 (C. C. A. 7th). But whether mandatory or not, it is well settled that the Commissioner has the absolute right to make a credit. *Standard Oil Co.* v. *United States*, 5 F. Supp. 976 (C. Cls.), certiorari denied, 293 U. S. 599; *United States ex rel. Cole* v.

---

* Like provisions are contained in other Revenue Acts. See Section 252, Revenue Act of 1918, c. 18, 40 Stat. 1057; Section 252, Revenue Act of 1921, c. 136, 42 Stat. 227; Section 281 (a), Revenue Act of 1924, c. 234, 43 Stat. 253; Section 284 (a), Revenue Act of 1926, c. 27, 44 Stat. 9; Section 322 (a), Revenue Act of 1928, c. 852, 45 Stat. 791.

Helvering, 73 F. (2d) 852 (App. D. C.); *Tull & Gibbs* v. *United States,* 48 F. (2d) 148 (C. C. A. 9th).

As the usual procedure for the recovery of debts is reversed in the field of taxation in relation to the assessment and collection of taxes, so is there a difference in the justiciable rights obtaining as between the Government and its citizens and as between one individual and another. The Government of course may not be sued without its consent, and it also may attach conditions to its consent to be sued when granted. Execution does not issue on judgments against the United States as in the case of individuals, and since the early days of our history judgments have not been paid where the judgment creditor is otherwise indebted to the Government. See Act of March 3, 1875, *infra,* p. 42. Assume that on the date the Commissioner determines an overpayment for one year the taxpayer files suit for that year and the Government confesses judgment. If there is then an outstanding assessment of taxes for another year, that judgment will not be paid to the taxpayer in cash. It will be used to satisfy the unpaid assessment.

The policy of the Act of March 3, 1875, has been carried out in the Revenue Acts. When an overpayment is determined by the Commissioner it is not to be refunded to the taxpayer in cash if there are other taxes then due from the taxpayer. It is to be—it "shall be"—credited against other taxes due and "any balance" refunded. But while not

receiving cash, the taxpayer receives the equivalent of cash when credit is made, for by the credit he is relieved of his obligation to pay the Government in cash and the danger of distraint of his property is removed.

Since an overpayment of taxes is not to be refunded when there are taxes due—that is, have been assessed—for another year, but is to be credited against those taxes, certainly no action will lie against a collector of internal revenue or against the Government for a year of overpayment to have a refund adjudged where the complaint itself shows that the overpayment had theretofore been determined and credited against unpaid assessments. Exact compliance with statutory duty on the part of Government officers cannot give rise to a cause of action against those officers or against the Government. The original wrong of the collector in exacting or accepting excessive payments of taxes will have been righted in the only way permitted by statute. Furthermore, if there be any doubt as to whether the statutes permit a suit against the United States where its officers have complied with the statutes, that doubt should be resolved against the taxpayer, for waivers by the United States of its sovereign immunity from suit are to be strictly construed. *United States* v. *Michel*, 282 U. S. 656.

Taxpayer does not seek, in the present case, an adjudication of its tax liability for the years

1922 to 1925, the years of original overpayment. There is no dispute between the taxpayer and the Government on that issue. The record in the present case is 360 pages in length; yet only a comparatively few sentences deal with the tax liability for the years 1922 to 1925, and then only to show that there was agreement as to those years. There has been, at various times, a controversy between the Government and the taxpayer over every tax return filed by the taxpayer in the fifteen year period from 1917 to 1931, inclusive. For some of the years (1917–1920), the taxpayer has now conceded that it had negligently understated its income (R. 81).[7] For other years (1922–1925) the Government has now conceded that the taxpayer had overpaid its tax (R. 95). For still other years (1930 and 1931) the deficiencies asserted by the Commissioner, which were satisfied by credit from the overpayments from the years 1922 to 1925, were concededly correct.

Of necessity, the present action can result only in an adjudication of the taxpayer's liability for the years to which the overpayments were applied,

[7] See also R. 139–141, 152–162. Cf. *Backus* v. *United States*, 59 F. (2d) 242 (C. Cls.), certiorari denied, 288 U. S. 610, where the Court of Claims recognized the binding effect of the decision of the Board of Tax Appeals determining the additional taxes and "penalty" due from the present taxpayer for the years 1917 to 1920. Although the Government is not in this Court questioning the decision of the court below on the merits, the *Backus* case tends to show that the Government's position on the merits of the years 1926, 1927 and 1928 was well founded.

and the nature of the suit should be judged by the objective sought. The taxpayer does not wish an adjudication of the fact of overpayment, for that had been conceded. The taxpayer cannot wish to compel payment of the overpayment in cash, for that could not be done if the taxes were "due" for another year. The complaint shows that taxes for another year were due at the time of the credit in the sense that the taxpayer was under the then obligation to pay in cash the amount of the outstanding assessments before litigating the correctness of the assessments. Obviously, the only possible object of this suit was to attack those assessments and have them declared erroneous. It was those questions alone, on the merits, with which the court below was concerned.[8] But the assessments and their collection by credit were the acts solely of the Commissioner of Internal Revenue, and the Government may be called in question for his acts,

[8] Demonstrative of the correctness of the statement that the taxpayer cannot and does not sue for the years 1922 to 1925 is the fact that a previous suit had been brought for the year 1922, and had been dismissed with prejudice (R. 144, 265–266). The dismissal with prejudice of the 1922 suit would seem clearly to bar another suit for 1922, at least if the new action is based upon the same grounds. If the new action be treated as based upon different grounds, that is, upon an alleged implied promise of the Commissioner to pay contained in the closing agreement (cf. R. 108–109) the District Court would have no jurisdiction since the amount involved exceeds $10,000 and the collector of internal revenue did not participate in the closing agreement. See Government's brief in *United States* v. *Bertelsen & Petersen E. Co.*, No. 416, present Term, pp. 24–25.

where the amount involved exceeds $10,000, only in the Court of Claims.

The consequences of the taxpayer's contention add additional support to our position. If the taxpayer be correct, a collector of internal revenue, who, we will assume, makes an erroneous collection for one years, may, even after he goes out of office, be compelled to defend in one suit the merits of tax assessments and collections for half a dozen other years with which he has had no connection and without an opportunity on the part of the Commissioner to correct administratively any error that he, the Commissioner, might have made in assessing, or collecting by credit, the taxes for those years. Clearly our revenue laws never contemplated any such procedure.

It is extremely significant that under respondent's theory there is no opportunity for the Commissioner to correct administratively, through the process of a claim for refund, any error which he has made in assessing a deficiency for the year to which the overpayment is credited. If the taxpayer's position be accepted, the correctness of the Commissioner's action in making a credit to another year need not be questioned by a claim for refund; the taxpayer simply brings suit for the year as to which there is no longer any controversy—the year of overpayment—and attacks in the courts the correctness of the assessment for the year of deficiency. The result is not only inconsistent with the whole administrative system estab-

lished by Congress for the adjustment of taxes, but also violates the primary mandate of administrative law that resort to judicial action is justified only after the administrative processes have been exhausted. Compare *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209.

It has long been thought settled that the filing of a claim for refund, setting forth the grounds upon which refund is sought, was a prerequisite to a suit to recover taxes. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. Nor is it any answer to say, as respondents do, that the need for a claim is dispensed with because the rules of pleading and procedure give the Government all the protection it needs or is entitled to have. That answer fails to appreciate the purpose of the rule. As this Court stated in the *Felt & Tarrant* case, *supra* (283 U. S. at 272):

> One object of such requirements is to advise the appropriate officials of the demands or claims intended to be asserted, so as to insure an orderly administration of the revenue, * * * a purpose not accomplished with respect to the present demand by the bare declaration in respondent's claim that it was filed "to protect all possible legal rights of the taxpayer."

There can be no serious question that the "orderly administration of the revenue" is jeopard-

ized if claims for refund are unnecessary here. The overpayments for 1922 to 1925 have here been applied as credits against assessments of deficiencies for six different years. The assessments for two of the years were concededly correct, and the court below has held that the assessments for three of the other years were in part correct. Orderly administration would certainly seem to require claims for refund directing the Commissioner's attention to the reason why the taxpayer believed the deficiencies to be erroneous, and giving the Commissioner the opportunity to correct any mistake he may have made, without the burdens attendant upon litigation in the courts. The taxpayer's view simply means that the statutory requirement for the filing of claims prescribing the contentions which may later be advanced by suit would effectively be obviated whenever there is a collection of a deficiency by credit rather than in cash. We think it clear that Congress never intended such a result.

Of course, as to the years 1926, 1927 and 1928, to which the parts of overpayments in question for 1922 to 1925 had been credited, suit could have been brought in the Court of Claims if proper claims for refund had been filed. *United States* v. *Swift & Co.*, 282 U. S. 468.* In the *Swift & Co.* case the

* See also the following cases where suit was entertained for years to which credits were applied: *Cerro de Pasco Copper Corp.* v. *United States*, 13 F. Supp. 633 (C. Cls.), certiorari denied, 298 U. S. 686; *Globe Gazette Printing Co.* v. *United States*, 13 F. Supp. 422 (C. Cls.), certiorari denied, 298 U. S. 682; *Trojan Powder Co.* v. *United States*, 13 F. Supp. 61 (C. Cls.), certiorari denied, 298 U. S. 674; *Foundation Co.* v. *United States*, 15 F. Supp. 229 (C. Cls.).

Commissioner had credited an overpayment of tax for one year against an erroneous deficiency for another year. This Court sustained a suit brought in the Court of Claims for the year of the deficiency, the principal question being whether a timely claim for refund for the year of the deficiency had been filed. The Court said (p. 476):

> * * * the second claim for refund * * * was filed within four years of the payment of the tax, since that payment must be taken to have occurred on the date of the allowance of the credit by the Commissioner's signature approving the schedule of refunds and credits.

Since, by the *Swift & Co.* case, there was a payment of the tax for the year of deficiency by virtue of the credit, it must follow as a corollary that there was a corresponding disposition to and for the use and benefit of the taxpayer to the amount of the overpayment. Hence, no suit could be brought against the Government for the year of the overpayment, for the Government would no longer have in its hands money to which the taxpayer would be equitably entitled for that year. Taxable years are treated as separate and distinct units, as we have shown above, p. 9, and it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years.

The recent decision in *United States* v. *Botany Worsted Mills*, 98 F. (2d) 880 (C. C. A. 3d), is in full accord with this position. That was a suit to recover interest on an overpayment of taxes for the year 1918 which had been credited against an

assessment of taxes for the year 1917. The assessment for 1917 was later determined to be erroneous, and the amount collected by the credit was refunded, with interest from the date of the credit. The suit sought additional interest from the date of the original payment to the date of the credit. The court denied recovery on the ground, among others, that the legal effect of the credit was a payment by the Government to the taxpayer of the 1918 tax refundable to it and a simultaneous payment by the taxpayer to the Government of the same amount on account of its then outstanding tax assessment for 1917. The credit, the court said (p. 883):

> • • • must be regarded as a valid final closing of the accounts between the Government and the taxpayer so far as the overpayment of 1918 tax was concerned. • • •.
>
> • • • • •
>
> We, therefore, conclude that the refund made in 1931 was of an overpayment of 1917 tax. It follows that the date of the overpayment was September 15, 1921, the date on which the amount overpaid for 1918 was credited by the Commissioner upon 1917 tax, since the credit amounted in law to a payment of the tax to which it was applied. *United States* v. *Swift & Co.*, 282 U. S. 468 • • •.

Our position is also supported by the decision of the Court of Claims in *American Woolen Co.* v. *United States*, 18 F. Supp. 783, 21 F. Supp. 125,

1021. The overpayment there found by the Board of Tax Appeals was credited against a deficiency found by the Board for another year. The court stated (18 F. Supp. at pp. 788–789):

> We have held that when a taxpayer has a decision of the Board in his favor he can bring suit thereon. But this does not mean that where the Commissioner has applied an overpayment found by the Board *in the manner required by law*, the taxpayer can still recover by suit the amount thereof. When the Government shows, as it has in this case, that the amount of the overassessment was credited on a deficiency then due under the decision of the Board, it is a complete defense. [Italics supplied.]

Actually, the case chiefly relied on by the taxpayer here in support of its theory—*United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U. S. 540—supports instead the position of the Government. As applied to the present case, the statements in the opinion are necessarily dictum, since the issue in that case was whether mandamus would lie to compel a refund of an overpayment found by the Board of Tax Appeals. The Court stated (pp. 542–543):

> When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, § 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the re-

> covery of any refund to which he is entitled. [Three decisions of the Court of Claims cited.] And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. • • •

We construe the statement that a plenary suit will lie in the District Court or the Court of Claims to mean that the suit will lie solely against the United States, and that the plaintiff has the choice of forums only when the amount involved does not exceed $10,000. Cf. *Lowe Bros. Co.* v. *United States,* 304 U. S. 302. More significant, however, is the reference to the fact that the statute provides that overpayments shall be refunded *or credited,* and that it is upon the Commissioner's *failure to comply* with the statute that a plenary suit lies. Although the case did not involve the question of a credit, it is significant that the opinion states that it is a complete defense to the plenary suit if other taxes are "due from the taxpayer." As we have shown above, pp. 9–10, taxes are "due" when an assessment has been made.

The taxpayer also relies upon *Libby, McNeill & Libby* v. *United States,* 9 F. Supp. 673 (C. Cls.). In that case an overpayment for 1917 was applied to an assessment for 1919, but at the time the credit was attempted to be made the assessment for 1919 had been paid in cash. Suit was allowed for the year 1917, but simply on the theory that the action

of the Commissioner was a nullity, since there was then no tax due for 1919. See 9 F. Supp. at 680.[10]

The taxpayer also relies on *Moses* v. *United States*, 61 F. (2d) 791 (C. C. A. 2d), certiorari denied, 289 U. S. 743. An overpayment of 1916 taxes had been credited against a 1915 deficiency, which, the court assumed for the purposes of the decision, was then barred from collection by the statute. A dictum of the court states that if the suit were construed as a suit to recover the 1916 overpayment the court would have jurisdiction, but recovery was denied on the merits. We believe the dictum to be erroneous. Moreover, in a subsequent decision, *Hammond-Knowlton* v. *Hartford Connecticut Trust Co.*, 89 F. (2d) 175 (C. C. A.

[10] The respondents in their brief in opposition also referred to this case, and others, to show that the Commissioner had at times reversed credits. The instant case does not involve the reversal of credits, and, if there be doubt as to the Commissioner's authority to do so, a decision of the question should await a case where the question is presented. It may be noted, however, that the practice of reversing credits, even if it were other than occasional, cannot have the consequence which the respondent pictures of carrying on litigation forever, for each time the Commissioner makes a credit he relieves the taxpayer of its obligation to pay in cash. If payment were made in cash, a claim for refund and suit would be necessary. No more is required when the collection is by credit. Accordingly, when a credit is reversed from one year and applied to another year, instead of claims for refund and suit being required for two years, as would be the case if the payments had been in cash for both of the years to which the one amount has been credited, only one suit would be necessary, inasmuch as the reversal of the credit grants the taxpayer relief for one of the years.

2d), certiorari denied, 302 U. S. 707, that court has indicated what we believe to be the correct theory, saying (89 F. (2d) at 178):

> In reality it is only the conduct of the Commissioner in disallowing the credit which has affected the appellee. Since this is so, the action against the collector cannot be maintained * * *.

We accordingly submit (a) that no cause of action has been stated for the years of original overpayment, 1922 to 1925, because the complaint itself shows that the overpayments had been determined and had been disposed of in the manner required by law, and (b) that the complaint, while construed by the taxpayer as attempting to state a cause of action for the years of original overpayments, really attempts to state a cause of action for the years of deficiency, and of these years the District Court could have no jurisdiction because the tax for those years was not collected by a collector of internal revenue but was collected by the credit made by the Commissioner, and because no claim for refund had been filed for those years.

(2) We believe, therefore, that the present suit must be considered as brought to litigate the merits and collectibility of taxes for other years, the years of the deficiencies. If that is so, concededly the District Court could not have entertained the suit, because no claims for refund for the years of the deficiencies were filed, and because for each of those years the taxes exceeded $10,000 and their collec-

tion was not by the collector but by the Commissioner in making the credit.

But even if the fact of a credit to another year does not preclude a suit for the year of original overpayment in cash, at least no suit may be maintained for that year unless it meets the requirements of Section 3226. Hence here, even if the suit be construed as the taxpayer seeks to construe it—as a suit for the years of original overpayment in cash—it must fail for lack of a sufficient claim for refund.

Section 3226, Revised Statutes, *infra*, p. 40, provides that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax until a claim for refund has been duly filed with the Commissioner of Internal Revenue. It is settled by the decisions of this Court that the claim which is required is one which sets forth the grounds which may later be asserted by the suit. *United States* v. *Felt & Tarrant Co.*, 283 U. S. 269; *United States* v. *Andrews*, 302 U. S. 517; *United States* v. *Garbutt Oil Co.*, 302 U. S. 528. One of the objects of the requirement for the filing of a claim for refund is to give notice to the administrative officials of the nature of the claim for which suit may be brought, to assure an orderly administration of the revenue, see pp. 17–18, *supra*. Consequently, even if the suit be for the years 1922 to 1925, the real nature of the taxpayer's complaint is nevertheless important in order to ascertain whether the statutory provisions relating to claim for refund have been met.

The matter cannot be dismissed, as the taxpayer seeks to do, by the assertion that claims for refund have been filed, and denied, for the years 1922 to 1925. As we have pointed out above, pp. 13–15, no issue is or can be made of the question whether the collector had collected excessive taxes for the years 1922 to 1925. That was the basis of the claims for refund filed for those years, but that issue is not in dispute. Nor does the taxpayer take the position that it is entitled to a refund in cash if there are taxes "due" for other years. It has conceded that there is a statutory duty placed upon the Commissioner to make a credit of overpayments against taxes for other years if taxes for those other years are "due" (R. 105). It has also conceded that an assessment of taxes by the Commissioner is presumed to be correct, and that (Br. in Opp., p. 9)—

> if the Government as a defense pleads the fact of credit elsewhere, it is the taxpayer's burden to show, if he can, that the deficiency to which the credit was applied was not lawfully owing.

We agree with the taxpayer that the burden is placed upon a taxpayer to show, if he can, that a deficiency to which a credit is applied is not lawfully owing. We disagree, as stated in (1), *supra*, pp. 9–24, that such a showing may be made and recovery had in a suit for the original year of overpayment. But irrespective of that, we believe that it becomes an element of the taxpayer's affirmative case to establish that no deficiency was owing

where, as here, the fact of credit elsewhere is pleaded by the taxpayer itself. Indeed, in such a situation the only issue between the parties may be whether the deficiency was in fact correct. Certainly that is so here.

No claim for refund was ever filed, however, giving notice to the Commissioner that the taxpayer considered the assessment of the deficiencies to be excessive. As we have pointed out above, there can be no question that the orderly administration of the revenue would be furthered in a case such as this—overpayments credited to six different years—by the filing of claims for refund directing the Commissioner's attention to the reasons why the taxpayer believed the credits to be erroneous, and giving the Commissioner the opportunity to correct mistakes before litigation is begun. We can perceive, in other words, no reason why the circumstances of the present case should make it any less necessary that the claims for refund present the contentions which may later be advanced. We think it clear that Congress never intended such a result, and that the taxpayer must fail because proper claims for refund were not filed.[11]

[11] In *Untermyer* v. *Bowers*, 79 F. (2d) 9 (C. C. A. 2d), certiorari denied, 296 U. S. 641, an overpayment for one year was credited against a deficiency for another year. After the credit, a second claim for refund was filed for the original year of overpayment, and upon its rejection suit was brought for that year, and suit was allowed because the second claim for refund had been filed within the statutory period for filing original claims. For the reasons stated in (1), *supra*, we do not agree with that decision, but it is dis-

II

IF SECTION 609 OF THE REVENUE ACT OF 1928 DOES NOT REQUIRE THAT A CREDIT TO A BARRED DEFICIENCY BE CONSIDERED A NULLITY, THE CREDIT BY THE COMMISSIONER OF PORTIONS OF THE OVERPAYMENTS OF TAXES FOR 1922 TO 1925, AGAINST THE BARRED DEFICIENCY FOR 1921 PRECLUDES SUIT IN THE DISTRICT COURT FOR THE YEARS 1922 TO 1925 TO RECOVER SUCH PORTIONS

In the present case, parts of the overpayments for the years 1922 to 1925, inclusive, were applied as credits against deficiencies assessed for the years 1926, 1927 and 1928. At the time of the credits, it is conceded by the taxpayer, the deficiencies were collectible, its contention being that the deficiencies were excessive. We have discussed above the effect of the credits upon these deficiencies.

The interest on the overpayments for 1922 to 1925, inclusive, was applied as a credit against an assessment for the year 1921. The Government's answer (R. 72–73) denied that the assessment for 1921 was erroneous or that it was barred from collection at the time of the credit, but it was conceded in the Circuit Court of Appeals that the assessment was barred.

The District Court stated in its opinion (R. 107) that it was difficult to perceive any substantial distinction between an application of an overpayment to a barred deficiency and the application of an overpayment to a deficiency which did not in fact exist. The Circuit Court of Appeals did not dis-

---

tinguishable from the present case on the grounds stated in (2), *supra*. In the instant case, no claim for refund was filed after the credit, much less within the statutory period.

cuss the question whether a distinction should be drawn between the application of a credit against a non-barred deficiency and the application of a credit to a deficiency that was barred from collection at the date of credit.

In the court below the taxpayer argued that the effect of Sections 607 and 609 of the Revenue Act of 1928, *infra*, p. 44, relating to collections of and credits to barred deficiencies is simply to deprive the Government of a defense by way of set-off which it would otherwise have, and that those sections thus operate to place barred deficiencies in a category with deficiencies not barred but simply unlawfully determined.

Section 607 of the Revenue Act of 1928 provides that any tax assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. Section 609 (a) provides that any credit against a liability in respect of any taxable year "shall be void" if any payment in respect of such liability would be considered an overpayment under Section 607.

Because of the provision in Section 609 that a credit against a barred deficiency "shall be void," the Government has in a number of cases argued that such a credit should be treated as a nullity. It made such an argument in *Lowe Bros. Co.* v. *United States*, 304 U. S. 302. The Circuit Court of Ap-

peals in that case had held that a credit against a barred deficiency was not a nullity, but constituted a collection by the Commissioner of the deficiency. This Court, however, stated that it would express no opinion as to whether the credit was a collection of the barred deficiency, since, if there was a collection, it was by the Commissioner and accordingly in no event would suit lie in the District Court for the year of the deficiency.

In *Graham & Foster* v. *Goodcell*, 282 U. S. 409, this Court said (p. 424):

> There is also a contention that section 611 does not apply when the tax was paid by the credit of the amount of an overpayment for *another taxable year. But the application* of a credit against an assessment at a time when collection was barred must be regarded as an erroneous collection, and we see no reason for taking such a case out of the statute.

The Circuit Courts of Appeals for the Second and the Sixth Circuits have cited the above decision of this Court as authority for the proposition that the act of crediting an overpayment against a liability barred by the statute of limitations constitutes a collection of the deficiency. *See Gans S. S. Line* v. *Bowers*, 82 F. (2d) 181, 183 (C. C. A. 2d), certiorari denied, 298 U. S. 676; *United States* v. *John Gallagher Co.*, 83 F. (2d) 368 (C. C. A. 6th). See also *United States* v. *Reeves Bros. Co.*, 83 F. (d) 121 (C. C. A. 6th), certiorari denied, 299 U. S. 573.

On the other hand, the Court of Claims has held that a credit against a barred deficiency is a nullity. See *Parks & Woolson Mach. Co.* v. *United States*, 58 F. (2d) 868 (C. Cls.), certiorari denied, 287 U. S. 634; *First Nat. Bank of Beaver Falls* v. *United States*, 8 F. Supp. 484 (C. Cls.), certiorari denied, 294 U. S. 717; *American Steam Conveyor Corp.*, v. *United States*, 10 F. Supp. 571 (C. Cls.), certiorari denied, 296 U. S. 599.

In *United States* v. *Bertelsen & Petersen E. Co.*, No. 416, present Term, where an overpayment for 1917 was credited against an allegedly barred deficiency for 1918, the jurisdiction of the District Court to entertain the suit as one for the year 1917 was sustained by the Circuit Court of Appeals, without mentioning Section 609 of the Revenue Act of 1928.

If those decisions are sound which hold that a credit of an overpayment for one year against a barred deficiency for another year is not a nullity, but that by such a credit the deficiency is collected by the Commissioner, then we submit that there is no valid ground for distinguishing a credit against a barred deficiency from a credit against a non-barred deficiency. In that case the arguments advanced in Point I, *supra*, with respect to the credit against the non-barred deficiencies for 1926 to 1928 are equally applicable to the credit against the barred deficiency for 1921, and, on those arguments, we believe that the credit precludes suit for the original year of overpayment. There is much to commend this interpretation of these sections.

Sections 607 to 611, inclusive, of the Revenue Act of 1928 were enacted to replace Section 1106 (a) of the Revenue Act of 1926. The latter section had failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund, and was repealed by Section 612 of the Revenue Act of 1928 as of February 26, 1926, the date of its enactment. See S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42, *infra*, pp. 48–51.

Section 1106 (a) of the Revenue Act of 1926 had provided, among other things, that the bar of the statute of limitations against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but that no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax.

The legislative history of Section 1106 (a) of the Revenue Act of 1926 shows that it was proposed in order to avoid the effect of a decision of the Court of Claims in *Tozaway Mills* v. *United States*, 61 C. Cls. 363, 372, holding that if a tax had been collected after the running of the statute of limitations the taxpayer could not set up that fact as entitling him to recover, but could establish a right to a refund only by proving that there had been an overpayment of the tax, on the theory that the stat-

ute of limitations did not extinguish the liability but merely barred the remedy. See *Helvering* v. *Newport Co.*, 291 U. S. 485, 489.

The Joint Committee on Internal Revenue Taxation, in recommending a change in Section 1106 (a) of the Revenue Act of 1926, stated (H. Doc. No. 139, 70th Cong., 1st Sess., p. 16):

> Prior to the enactment of the 1926 Act there was doubt as to the legal effect of the bar of the statute of limitations. Was the taxpayer entitled to recover amounts paid after the statutory period if prior thereto he owed that amount of additional tax? Was it important whether the payment after the period was made freely or under duress? These and related questions were the subject of section 1106 (a). Unfortunately the section appears to contain elements of doubt which should be clarified. The principal results of the recommendations submitted is that the bar of the statute, whether against the Government or the taxpayer, shall have the same general effect as though the barred obligation had been satisfied (so far as collecting it after the expiration of the period is concerned), and that payments by either after the period shall be deemed to be overpayments to be recovered in the same general manner as an ordinary overpayment within the period. • • •

True the word "void" is used in Section 609 of the Revenue Act of 1928 in referring to a credit

against a barred liability, whereas the word "overpayment" is used in Section 607 in referring to a payment in cash of a barred liability. However, the word "void" does not necessarily mean a "nullity." As this Court said in *Ewell* v. *Daggs*, 108 U. S. 143, 148–149:

> It is quite true that the usury statute referred to declares the contract of loan, so far as the whole interest is concerned, to be "void and of no effect." But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages, and others, in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. • • •

See also *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 311.

The Revenue Acts impose the right and duty upon the Commissioner of Internal Revenue to make credits. Often the question whether a deficiency is barred from assessment or collection involves complicated matters of fact and of law. Thus in *United States* v. *Bertelsen & Petersen E. Co.*, No. 416, present Term, four independent reasons were advanced by the Government in the court below as to why the assessment of the deficiency there involved should have been considered timely. The

Circuit Courts of Appeals were in conflict on one of the grounds advanced by the Government, that is, whether a waiver may be valid although not signed by the Commissioner. See *Stearns Co.* v. *United States,* 291 U. S. 54, 59. Clearly if there were a question as to whether a deficiency in taxes was barred from assessment or collection, the Revenue Acts contemplate that the Commissioner should determine that question initially and should act in accordance with his conclusion. If he concludes that the deficiency is not barred, he is certainly contemplated that he will proceed to have it collected. Even though a taxpayer could establish that collection of a deficiency is barred, it may not prevent its collection. Conditions precedent to an adjudication of that question, as in the case of an alleged erroneous deficiency, are to pay the tax, file claim for refund, and then sue. See *Graham* v. *duPont,* 262 U. S. 234; *Mellon* v. *Mertz,* 82 F. (2d) 872 (App. D. C.), certiorari denied, 299 U. S. 548.

As the Commissioner is under a duty to have an assessment of a deficiency collected if he concludes that collection is not barred, there is equally a duty upon him to credit an overpayment for one year against a deficiency if he thinks the deficiency is properly collectible. Since the matter is one committed to the Commissioner's discretion, a *prima facie* presumption of correctness of a credit will result from the action of the Commissioner in making the credit. Section 609 is entitled "Erroneous

Credits," and provides in effect that a credit shall be void if it is against a deficiency which is barred from assessment or collection. It is a reasonable construction to say that it was intended to prohibit a credit against a deficiency which the Commissioner conceded was barred, and thus deprive the Commissioner of a right which he had deemed to be his until the passage of the Revenue Act of 1926. Cf. *Toxaway Mills* v. *United States, supra; Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346. Cf. also *McEachern* v. *Rose*, 302 U. S. 56, where a credit had not been made but the Commissioner relied upon a concededly barred deficiency for one year as a reason why the taxpayer was not entitled to recover an overpayment for another year. See also *Stone* v. *White*, 301 U. S. 532, 538. However, where the Commissioner does not concede that the assessment or collection of a deficiency is barred, a different question is presented as to the course to be taken in securing an adjudication of that underlying question upon the outcome of which will depend the conclusion whether the credit is or is not "void." The real question to be litigated is whether the Commissioner erred in his determination that assessment or collection was not barred. Hence the same procedure should be followed in securing an adjudication of that question as in securing an adjudication of the question whether the Commissioner erred in determining the amount of taxes due. A collector of internal revenue would have no part in the initial determination of the

question whether a deficiency is barred from assessment or collection, and he would have no part in the crediting of an overpayment against the deficiency. It is possible that he may have died or have resigned years before the credit occurred, and yet, under the taxpayer's theory, he or his executor might be compelled to defend the correctness of the Commissioner's action in which he had no participation. The question is one which relates solely to the year of deficiency and to the action of the Commissioner, and accordingly we submit that suit should be brought for the year of deficiency and in the only forum where the United States has consented to be sued for the acts of the Commissioner where the amount involved exceeds $10,000, that is, the Court of Claims.

And as a condition precedent to suit, we submit that the taxpayer must file a claim for refund directing the Commissioner's attention to the grounds for asserting that the Commissioner's action is erroneous, and afford him the opportunity for correcting any error that he may have committed. Here no claim for refund was filed for the years to which the credits were applied, nor was any claim for refund filed for the original years of overpayment containing as a ground for refund the alleged erroneous action of the Commissioner in making the credit. Irrespective of the conclusion as to the proper year for suit and as to the proper forum, the present suit should be dismissed because proper claims for refund have not been filed.

CONCLUSION

1. The complaint does not state a proper cause of action against the United States within the jurisdiction of the District Court for the recovery of those parts of the overpayments for 1922 to 1925 applied as credits against non-barred deficiencies in excess of $10,000 for other years because—

(a) The credit of an overpayment against a deficiency constitutes an absolute defense to a suit for overpayment, and such credit is shown by the complaint itself.

(b) The real issue sought to be litigated is the correctness of the assessments for the years of deficiencies collected by the credits, and the District Court could have no jurisdiction of those years because the collections were not by a collector of internal revenue, and because no claims for refund were filed for the years of deficiency.

(c) No claims for refund were filed for the years of overpayment directing the Commissioner's attention to the ground relied on for recovery, namely, the alleged erroneous credits by the Commissioner.

2. The same reasons which compel the conclusion that the credits to the non-barred deficiencies preclude the maintenance of the present suit in the District Court require the conclusion that no cause within the jurisdiction of the District Court has been stated as to the credits to the barred deficiency.

The judgment of the court below should be reversed, with directions that the complaint be dismissed.

Respectfully submitted.

ROBERT H. JACKSON,
Solicitor General.

JAMES W. MORRIS,
Assistant Attorney General.

SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.

CHARLES A. HORSKY,
Special Attorney.

JANUARY 1939.

APPENDIX

Revised Statutes:

SEC. 3226 [as amended]. No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates. (U. S. C., Title 26, Sec. 1672–1673.)

SEC. 3228 [as amended]. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected,

or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as otherwise provided by law in the case of income, war-profits, excess-profits, estate, and gift taxes, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum. The amount of the refund (in the case of taxes other than income, war-profits, excess-profits, estate, and gift taxes) shall not exceed the portion of the tax, penalty, or sum paid during the four years immediately preceding the filing of the claim, or if no claim was filed, then during the four years immediately preceding the allowance of the refund.

* * * * *

(U. S. C., Title 26, Sec. 1433.)

Judicial Code, as amended:

SEC. 24. The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, * * *; and of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, pen-

> alty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced. • • • All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury. (U. S. C., Title 28, Sec. 41.)

Act of March 3, 1875, c. 149, 18 Stat. 481, as amended by the Act of March 3, 1933, c. 212, 47 Stat. 1489, Sec. 13:

> That when any final judgment recovered against the United States duly allowed by legal authority shall be presented to the Comptroller General of the United States for payment, and the plaintiff therein shall be indebted to the United States in any manner, whether as principal or surety, it shall be the duty of the Comptroller General of the United States to withhold payment of an amount of such judgment equal to the debt thus due to the United States; and if such plaintiff assents to such set-off, and discharges his judgment or an amount thereof equal to said debt, the Comptroller General of the United States shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff denies his indebtedness to the United States, or refuses to consent to the set-off, then the Comptroller General of the United States shall withhold payment of such further amount of such judgment, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Comptroller General of the United States to cause legal proceedings to be immediately commenced to enforce the

same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt and costs shall be less than the amount so withheld as before provided, the balance shall then be paid over to such plaintiff by such Comptroller General of the United States with 6 per centum interest thereon for the time it has been withheld from the plaintiff. (U. S. C., Title 31, Sec. 227.)

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 606. CLOSING AGREEMENTS.

(a) *Authorization.*—The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) *Finality of agreements.*—If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, re-

fund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

* * * * *

(U. S. C., Title 26, Sec. 1660.)

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. U. S. C., Title 26, Sec. 1670.)

SEC. 609. ERRONEOUS CREDITS.

(a) *Credit against barred deficiency.*—Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

(b) *Credit of barred overpayment.*—A credit of an overpayment in respect of any tax shall be void if a refund of such overpayment would be considered erroneous under section 608.

(c) *Application of section.*—The provisions of this section shall apply to any credit made before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1675.)

Revenue Act of 1932, c. 209, 47 Stat. 169:

SEC. 321. OVERPAYMENT OF INSTALLMENT.

If the taxpayer has paid as an installment of the tax more than the amount determined to be the correct amount of such installment, the overpayment shall be credited against

the unpaid installments, if any. If the amount already paid, whether or not on the basis of installments, exceeds the amount determined to be the correct amount of the tax, the overpayment shall be credited or refunded as provided in Section 322.

SEC. 322. REFUNDS AND CREDITS.

(a) *Authorization.*—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer.

(b) *Limitation on allowance.*—

(1) *Period of limitation.*—No such credit or refund shall be allowed or made after two years from the time the tax was paid, unless before the expiration of such period a claim therefor is filed by the taxpayer.

(2) *Limit on amount of credit or refund.*—The amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim, or if no claim was filed, then during the two years immediately preceding the allowance of the credit or refund.

(c) *Effect of petition to board.*—If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer

for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Board which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) *Overpayment found by board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax paid more than two years before the filing of the claim or the filing of the petition, whichever is earlier.

(e) *Tax withheld at source.*—For refund or credit in case of excessive withholding at the source, see section 143 (f).

H. Rep. No. 2, 70th Cong., 1st Sess., pp. 33–34:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 Act failed to resolve many doubtful questions as to the

legal effect which follows the expiration of the period of limitations prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 Act is repealed as of its effective date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitations against the United States and section 608 relates to the effect of the expiration of limitations periods against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made after the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this Act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also, neither section applies to cases which have

been closed by a final agreement under section 1106 (b) of the 1926 Act or section 606 of the new Bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATIONS AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this Act, of a claim filed within the proper period and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or a credit of a barred overpayment against a deficiency which is not barred, shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608. In other words, the credit is void if either the deficiency or the overpayment is barred.

Section 609 applies to any credit made before or after the enactment of this Act.

S. Rep. No. 960, 70th Cong., 1st Sess., pp. 41–42:

SEC. 607. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST UNITED STATES.

Section 1106 (a) of the 1926 act failed to resolve many doubtful questions as to the legal effect which follows the expiration of the period of limitation prescribed for the assessment or collection of a tax or for the making of a refund or credit or the bringing of a suit for refund. Section 1106 (a) of the 1926 act is repealed as of its effective

date and is replaced by sections 607, 608, 609, and 610 of this bill.

Section 607 of the bill prescribes the effect to be given to the expiration of a period of limitation against the United States and section 608 relates to the effect of the expiration of a period of limitation against the taxpayer.

Section 607 provides that regardless of the correct tax liability any payment shall be an overpayment if made pursuant to an assessment after the expiration of the period of limitation on assessment (no assessment having been made within such period) or after the expiration of the period of limitation on collection by distraint or court proceedings (no distraint or court proceeding having been begun within such period). It is immaterial whether the payment was voluntary or involuntary, and duress is also of no significance in determining the right to recover an amount paid after the statute has run. An overpayment under section 607 is to be credited or refunded the same as any other overpayment.

Section 607 is applicable to payments made before or after the enactment of this act. Any such overpayment shall be credited or refunded, however, only if claim therefor is filed within the proper period of limitation.

The section has been rewritten by a committee amendment in somewhat simpler language.

Neither section 607 nor section 608 applies to payments pursuant to a final decision of the Board of Tax Appeals or of a court, whether or not the question as to the statute of limitations was raised in the proceeding. The decision is final and under no circumstances could a payment pursuant to it be considered erroneous. Obviously, also,

neither section applies to cases which have been closed by a final agreement under section 1106 (b) of the 1926 act or section 606 of the new bill.

SEC. 608. EFFECT OF EXPIRATION OF PERIOD OF LIMITATION AGAINST THE TAXPAYER.

If a refund is made after the expiration of the period for filing claim (claim not having been filed within the period) or after the rejection, after the date of the enactment of this act, of a claim filed within the proper period, and if the period for filing suit has expired (no suit having been filed within the period), the refund thus made shall be considered as erroneous and is recoverable by the United States as provided in section 610.

It seems desirable to provide some means whereby, in connection with questions of broad application to a great number of cases, one test suit may be brought and all the other cases involving the same point may be held in abeyance until the test suit is decided. Accordingly, the committee proposes to amend the House bill by inserting in section 608 a provision to the effect that in cases of the kind described the commissioner and the taxpayer may execute an agreement suspending the running of the statute of limitations for filing suit until final decision in the test case or cases named in the agreement. This amendment will prevent a multiplicity of suits without disturbing in any way the desirable policy embodied in the provisions of the House bill. It will be noted that the agreement is not that the parties thereto shall be bound by the test case in the settlement of the tax liability.

SEC. 609. ERRONEOUS CREDITS.

Section 609 provides that a credit of an overpayment against a barred deficiency or

a credit of a barred overpayment against a deficiency which is not barred shall be void if payment of the deficiency in the first case or the making of a refund in the second would constitute an overpayment or an erroneous refund under section 607 or 608.

Section 609 applies to any credit made before or after the enactment of this act.

U. S. GOVERNMENT PRINTING OFFICE: 1939

FILE COPY

NOV 19 1938

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

UNITED STATES OF AMERICA,

Petitioner,

vs.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. B. FAEGRE
HAYNER N. LARSON
Attorneys for the Respondents

COBB, HOKE, BENSON, KRAUSE & FAEGRE
Of Counsel

Hayward Brief Co., 401-7 Fourth Ave. So., Minneapolis

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	3
Conclusion	10
Appendix	11

CITATIONS

Cases:

American Steam Conveyor Corp. vs. *United States*, 10 F. Supp. 571, certiorari denied, 296 U. S. 599 — 7

American Woolen Co. vs. *United States* (Ct. Cls.), 18 F. Supp. 783, 21 F. Supp. 125 — 8, 9

Eastman Kodak Co. vs. *United States* (Ct. Cls.), 13 F. Supp. 435, certiorari denied, 299 U. S. 581 — 9

Gans S. S. Line vs. *Bowers* (C. C. A. 2d), 82 F. (2d) 181, certiorari denied, 298 U. S. 676 — 7

Jelke Co. vs. *Smietanka* (C. C. A. 7th), 86 F. (2d) 470, certiorari denied, 300 U. S. 669 — 4

Libby, McNeill & Libby vs. *United States* (Ct. Cls.), 9 F. Supp. 673 — 8, 9

Lowe Bros. Co. vs. *United States*, 304 U. S. 302 — 3

McEachern vs. *Rose*, 302 U. S. 56 — 8

Moses vs. *United States* (C. C. A. 2d), 61 F. (2d) 791, certiorari denied, 289 U. S. 743 — 4, 5

Parks & Woolsen Mach. Co. vs. *United States*, 58 F. (2d) 868, certiorari denied, 287 U. S. 634 — 7

Pratt & Whitney Co. vs. *United States* (Ct. Cls.), 6 F. Supp. 574, 10 F. Supp. 148, certiorari denied, 295 U. S. 760 — 4

Rosenstadt & Waller vs. *United States*, 7 F. Supp. 287 — 7

Stone vs. *White*, 301 U. S. 532 — 8, 10

Tucker vs. *Alexander*, 275 U. S. 228 — 4

United States vs. *Bertelsen & Petersen E. Co.* (C. C. A. 1st), 95 F. (2d) 867, certiorari applied for, No. 416, October Term, 1938 — 7

United States vs. *Botany Worsted Mills* (C. C. A. 3rd), 98 F. (2d) 880 — 6, 9

United States vs. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269 — 4, 8

United States vs. *First Wisconsin Trust Co.* (C. C. A. 7th), 92 F. (2d) 840 — 5

United States vs. *John Gallagher Co.* (C. C. A. 6th), 83 F. (2d) 368 — 7

United States ex rel. Girard Co. vs. *Helvering*, 301 U. S. 540 — 7, 10

United States vs. *Jaffray*, 97 F. (2d) 488 — 1

United States vs. *Reeves Bros. Co.* (C. C. A. 6th), 83 F. (2d) 121, certiorari denied, 299 U. S. 573 — 7

United States vs. *Swift & Co.*, 282 U. S. 468 ..... 5, 6
Webster vs. *Fall*, 266 U. S. 507 6
Wolverine Petroleum Corp. vs. *Commissioner* (C. C. A. 8th), 75 F. (2d) 593 4

Statutes:
Judicial Code, as amended, Sec. 24 (20) 3, 4, 11
Judicial Code, as amended, Sec. 240 (a) 2
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 284 13
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 606 (U. S. C., Title 26, Sec. 1660) 2, 5, 12
Sec. 607 (U. S. C., Title 26, Sec. 1670) 9, 10, 13
Sec. 609 (U. S. C., Title 26, Sec. 1675) 9, 10, 13
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 1103 (a) 4, 11
Revised Statutes:
Sec. 3226 (as amended), (U. S. C., Title 26, Sec. 1672) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

UNITED STATES OF AMERICA,

Petitioner,

vs.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 103-127) is not reported. The opinion of the Circuit Court of Appeals (R. 346-354) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938. (R. 355.) A petition for rehearing (R. 355-357) was denied July 25, 1938 (R. 358). The petition for a

writ of certiorari was filed October 25, 1938. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where claims for refund of taxes overpaid for several years are denied and suit is thereupon brought in the District Court to compel the refund, whether jurisdiction to hear the suit is lost by reason of the circumstance that the only defense asserted is that taxes were owing for other years and that the overpayments have been credited against such other taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*.

STATEMENT

The respondents pleaded and proved that the corporation of whose estate they are trustees paid income taxes for 1922 to 1925 to a Collector of Internal Revenue who was not in office when this proceeding was begun, that claims for refund thereof were thereafter filed for a sum in excess of $10,000 (R. 1, 2-4, 134, 135-137, 78-80), and that the Commissioner of Internal Revenue rejected the claims and refused to make the refunds (R. 4, 15-23, 146, 239-240, 97, 98).

The respondents did not close their complaint at this point but instead proceeded to allege the reasons advanced by the Commissioner for his refusal to return the money and why such reasons were not well-founded. They pleaded and proved that the Commissioner, by execution of a closing agreement under Section 606 of the Revenue Act of 1928, had in fact acknowledged that the overpayments had been made (R. 6, 23-28, 144, 214-218, 88), but that he claimed

and determined, contrary to what was established upon the trial and is now settled and agreed (R. 347-354; Pet. 6), that there were tax deficiencies owing for 1921, 1926, 1927, and 1928, and that he applied the overpayments as credits against these deficiencies (R. 5-6, 10-12, 141-142, 145-146, 84-86, 95-97).

The courts below held that to the extent the deficiencies for 1921, 1926, 1927, and 1928 were erroneously determined the Commissioner had no lawful right to apply the overpayments thereto as credits and therefore was without lawful right to refuse to return the company's money, and ordered that to that extent the overpayments should be refunded. (R. 98-103, 347-354.)

ARGUMENT

The petition avers (Pet. 5) that the question of jurisdiction as here presented is an important one of which this Court should undertake review. We believe that such is not the case.

Jurisdiction of the District Courts in cases of this kind is governed by Section 24 (20) of the Judicial Code as amended, *infra*. Where, as here, the claim is one for the recovery of internal-revenue taxes in an amount exceeding $10,000 alleged to have been erroneously collected, the only requirements imposed by that statute are that it must appear (1) that the taxes were collected by a collector of internal revenue and (2) that such collector was out of office when the proceeding was commenced. See *Lowe Bros. Co. vs. United States*, 304 U. S. 302. Both requirements were met here (R. 1, 2-4, 135-137, 78-80), and the Government makes no assertion to the contrary. The obvious conclusion is that the trial court had power to entertain the suit. There is involved in it nothing of novelty or of unusual importance.

Fundamentally, so far as concerns the question of jurisdiction, the case is indistinguishable from scores of others that yearly pass through the District Courts.[1]

The Government rather assumes (Pet. 5-10) that the contrary must be true because of the circumstance that the Government was without or elected not to interpose any defense to the allegation of overpayment, but instead did no more than assert that it had the right to withhold the money in satisfaction of taxes which it claimed were owing for other years—an assertion which it is now determined was without foundation. The manifest answer is that jurisdiction once acquired is not lost because of the number or character of the

---

[1] While jurisdictional requirements are governed by Section 24 (20) of the Judicial Code, there are certain other conditions which are essential to maintenance of suit when insisted upon but are not jurisdictional in character. Tucker vs. Alexander, 275 U. S. 228, 231. Most of them are prescribed by Revised Statutes, Section 3226, as amended by Section 1103 (a) of the Revenue Act of 1932, infra. In the interest of clarity we show compliance with such other conditions also:

a. Claims for refund must have been filed. They were. (R. 3-4, 135-137, 79-80.)

b. The claims must have been disallowed or six months must have expired without action by the Commissioner. Both occurred here, but it is sufficient to point out that the claims were disallowed August 31, 1933. (R. 4, 146, 239-240, 97, 98.) While the making of a credit in response to a claim for refund is of course an "allowance" of an overpayment in the sense that the Commissioner agrees that the taxes in question have been overpaid, the Government has often contended and the courts have uniformly held that the making of the credit is a rejection of the claim for refund. See Pratt & Whitney Co. vs. United States (Ct. Cls.), 6 F. Supp. 574, 576, 10 F. Supp. 148, 150, certiorari denied, 295 U. S. 760; Magee vs. United States (C. C. A. 2d), 61 F. (2d) 791, 795, certiorari denied, 289 U. S. 743; Jelke Co. vs. Smietanka (C. C. A. 7th), 56 F. (2d) 470, 473, certiorari denied, 300 U. S. 669. See also R. 105.

c. The suit must have been commenced within two years after rejection of the claims. It was. (R. 15, 109.)

d. Recovery must be sought on grounds specified in the claims. United States vs. Felt & Tarrant Co., 283 U. S. 269. That is the case here; the claims specified grounds on the basis of which the overpayments agreed upon in the closing agreement were determined. (R. 147, 97.) The agreement was of course conclusive in the absence of fraud, malfeasance, or misstatement of material fact, and by it the parties not only dispensed with the necessity of but also precluded alleging and proving the grounds specified in the claims. Wolverine Petroleum Corp. vs. Commissioner (C. C. A. 8th), 75 Fed. (2d) 593, 595-596. See R. 104-105, 69.

defenses interposed on the merits. Suppose, for example, that the petitioner had denied the fact of overpayment.[3] In that event the existence of jurisdiction would have been obvious, and presumably the Government would so concede. If upon trial, however, the proof adduced by the complainants had been sufficiently imposing to induce the Government to abandon that defense and to rely solely on the fact of credit to other years, no one would suppose that the exigencies of the Government's position could have had so far-reaching an effect as to have compelled the court to dismiss on the ground that its authority to hear terminated upon collapse of the first defense. Clearly, as the trial court pointed out (R. 106), the fact of credit is a matter of defense, not of jurisdiction.

Such obligation as the Commissioner has to credit overpayments against deficiencies determined for other years (Pet. 8-10) does not by its performance obliterate the fact of overpayment or the taxpayer's cause of action founded thereon, and *United States vs. Swift & Co.*, 282 U. S. 468 (Pet. 9-10), does not compel any other conclusion. It is true that suit was there brought for refund of an overpayment collected by credit (p. 469), but the sole question there discussed and decided related to the effective date of such col-

---

[3]The petition impliedly assumes (Pet. 6-7) that the Government would have had no right to make such denial, on the ground that the fact of overpayment was established by the closing agreement. There is no warrant for any such assumption. The closing agreement would simply bear on the ultimate efficacy of the denial, not on the right to make it; before the Government could make its denial effective it would have the burden of establishing that the agreement was for some reason inoperative. See Section 606 of the Revenue Act of 1928, infra.

The allegations of the complaint as to why the Commissioner refused to make refund were of course matters of defense and technically surplusage in the complaint, just as were similar allegations by the plaintiffs in Moore vs. United States, supra, p. 794. Cf. United States vs. First Wisconsin Trust Co. (C. C. A. 7th), 92 Fed. (2d) 840, 845. They did not preclude the Government from interposing other defenses, including the defense that there were no overpayments.

lection; so far as the opinion indicates, no consideration whatever was given to whether suit for the year of overpayment by credit was proper, much less to whether the taxpayer could have sued for the year of overpayment in cash. Perhaps it is fair to indulge the presumption that this Court regarded, or at least assumed, that the procedure followed was permissible, but that is vastly different from saying that its decision is authority for the proposition that that procedure was exclusive and that the taxpayer could not have sued for the years of original overpayment—an issue not even in the case. The *Swift* decision does not support the petitioner's position; the question did not so much as lurk in the record. Cf. *Webster vs. Fall*, 266 U. S. 507, 511.

Perchance it is not going too far to say that the question did lurk in the record in *United States vs. Botany Worsted Mills* (C. C. A. 3d), 98 F. (2d) 880 (Pet. 13). But a reading of the opinion in that case demonstrates unmistakably (p. 883) that the decision there was made to turn, not on any jurisdictional issue, but on interpretation of the statute governing interest—whether the taxpayer should be permitted to receive an advantage over other taxpayers in all respects similarly situated except for the circumstance that their refunds were made at an earlier date.

The fact is that so far as we have been able to ascertain, there is no decision which by express holding is in conflict with the conclusion reached below. It is true that there are several cases in which it has been held that the taxpayer upon facts analogous to those at bar has a cause of action for the years to which the overpayments are applied as credits, but in none of them is it declared that there is no cause of action for the years of original overpayment or that the District Courts are without power to entertain suits for

such years.[8] On the other hand, *United States vs. Bertelsen & Petersen E. Co.* (C. C. A. 1st), 95 F. (2d) 867 (petition for a writ of certiorari pending, No. 416, October Term, 1938), is in complete accord with the decisions below, holding specifically (p. 868) that District Courts have jurisdiction in cases of this kind.

That the fact of credit is a matter going to defense, not to jurisdiction, is clear from what this Court recently said in *United States ex rel. Girard Co. vs. Helvering,* 301 U. S. 540. An overpayment had there been determined by the Board of Tax Appeals. The taxpayer brought mandamus to compel refund. It was held that mandamus was not the proper remedy and that the right to the refund should be determined by bringing a suit for refund. The Court said (pp. 542-543):

> When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, Sec. 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. See *National Fire Insurance Co. vs. United*

---

[8] To this category belong such cases as United States vs. John Gallagher Co. (C. C. A. 6th), 53 F. (2d) 368; United States vs. Reeves Bros. Co. (C. C. A. 6th), 83 F. (2d) 121, certiorari denied, 299 U. S. 573, and Gans S. S. Line vs. Bowers (C. C. A. 2d), 82 F. (2d) 181, certiorari denied, 298 U. S. 676 (Pet. 12). The Court of Claims goes so far as to hold that suit may be brought only for the year of cash overpayment. Parks & Woolson Mach. Co. vs. United States, 58 F. (2d) 868, certiorari denied, 287 U. S. 634; Rosenstadt & Waller vs. United States, 7 F. Supp. 287; American Steam Conveyor Corp. vs. United States, 10 F. Supp. 571, certiorari denied, 296 U. S. 599. In this connection it is interesting to note the Government's suggestion (Pet. 9) that the respondents' "remedy" was to proceed in the Court of Claims for the years of collection by credit; had the suggestion been followed the respondents would of course have been turned out of court without a hearing on the merits.

Incidentally, the Rosenstadt decision, while agreeing with the Government's position (Pet. 10) that "it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years," takes sharp issue (pp. 288-289) with the suggestion that the year of overpayment must be the year of collection by credit rather than the year of collection in cash.

> *States,* 52 F. (2d) 1011, 1013-1014; *James vs. United States,* 38 F. (2d) 140, 143; *Ohio Steel Foundry Co. vs. United States,* 38 F. (2d) 144, 148-149. And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. See *Stone vs. White, supra* [301 U. S. 532]; *Welch vs. Obispo Oil Co., ante,* p. 190; *Lewis vs. Reynolds,* 284 U. S. 281; *Crocker vs. Malley,* 249 U. S. 223.
>
> In view of what we have just decided in *Stone vs. White, supra,* it is evident that in the circumstances of this case there is no clear duty of the Commissioner to refund the tax without securing a final adjudication of the government's right to retain it, as he may do by interposing an appropriate defense in a suit for the refund.

See also *Libby, McNeill & Libby vs. United States* (Ct. Cls.), 9 F. Supp. 673, 680, and *American Woolen Co. vs. United States* (Ct. Cls.), 18 F. Supp. 783, 788, 21 F. Supp. 125. Cf. *McEachern vs. Rose,* 302 U. S. 56, and *Stone vs. White,* 301 U. S. 532.

If it is permissible in a case of this kind to bring suit for the years of original overpayment, then of course there is no foundation for the Government's statement (pp. 10-11) that the decision below is in conflict with *United States vs. Felt & Tarrant Co., supra.* That case does not hold that the taxpayer may be compelled to file claims for refund, not only for the years of collection in cash, but also for the years of collection by credit. Such a rule, moreover, would have very little to commend it. The rules of pleading and procedure

give the Government all the protection it needs or is entitled to have; if the Government as a defense pleads the fact of credit elsewhere, it is the taxpayer's burden to show, if he can, that the deficiency to which the credit was applied was not lawfully owing. Furthermore, there would be no point in a rule requiring the taxpayer to apprise the Government of the character and validity of its own defense, which the Government may or may not raise, as it chooses.[4]

The petition alleges (pp. 11-12) a conflict of views as to whether Sections 607 and 609 of the Revenue Act of 1928, *infra*, "prevent a credit of an overpayment for one year to a barred deficiency for another year from being considered a collection of the tax for the year of the deficiency, and hence corresponding confusion as to the proper year for suit."

Such conflict as there may be relates solely as to whether

---

[4]In any event, the filing of a claim does not bear on jurisdiction. See note 1, supra.

In this connection it may not be amiss to observe that the issues sought to be raised by the petition relate not so much to the problem of jurisdiction as they do to the question of the proper year for suit—whether the taxpayer has a cause of action for the year of collection in cash or only for the year of collection by credit. Viewed in this light, the utter baselessness of the Government's contentions is even more readily apparent. Suppose a taxpayer makes a cash overpayment of his 1935 tax, which the Commissioner credits to a deficiency for 1928. If the argument in the petition be sound, the taxpayer would then have to file a claim for refund and sue for 1928. Suppose he does so, but that then the Commissioner decides that he was mistaken, that there was no tax due for 1928, instead determines a deficiency for 1931, "reverses" the previous credit, and applies the 1928 overpayment to 1931. Under the Government's theory the taxpayer would then have to drop his suit for 1928 and begin all over again for 1931. The process of reversal, dismissal, and new claim for refund and suit could go on forever. Cf. R. 107. It is not uncommon for the Commissioner to reverse a credit. He did it in Eastman Kodak Co. vs. United States (Ct. Cls.), 13 F. Supp. 435, 451, certiorari denied, 299 U. S. 581; American Woolen Co. vs. United States, supra, 16 F. Supp. 787, 788; Libby, McNeill & Libby vs. United States, supra, pp. 678, 679; Botany Worsted Mills vs. United States, supra, p. 852. The fact is that even in the instant case overassessments were abated (R. 85-86, 141-142), and the credits finally made were different from those set out in the certificates of overassessment (R. 97, 146). If a taxpayer may sue only for the year to which an overpayment is credited, manifestly the possibilities for wearing him down are just about unlimited.

suit will lie for the year of collection by credit; there is no conflict as to whether suit will lie for the year of collection in cash. Here the only year as to which collection by credit was barred was 1921. Had suit been brought for 1921 the question might have been important. However, since suit was not brought for that year, a decision on the point would not be dispositive so far as the instant case is concerned.

Moreover, the recent decision of this Court in *Stone vs. White, supra,* indicates quite clearly that the procedure followed at bar is proper. It was there said (p. 538) that Sections 607 and 609 "preclude, in a suit by the taxpayer against the collector or the government, reliance on a claim against the taxpayer, barred by statute, as a set-off or counterclaim."

CONCLUSION

The holding of the Circuit Court of Appeals that the District Court had jurisdiction is correct and there is no conflict of decisions; on the contrary, all decisions in which the question has been considered are in accord. Moreover, the question is not novel or important; the procedure followed is fundamentally indistinguishable from that commonly pursued and conforms with what this Court, in such decisions as *United States ex rel. Girard Co. vs. Helvering, supra,* has indicated is the approved course. In any event, it is agreed that upon the merits the respondents are entitled to prevail. The petition should be denied.

Respectfully submitted,

J. B. Fabgre
Haynes N. Larson
Attorneys for the Respondents

Cobb, Hoke, Benson, Krause & Fabgre
Of Counsel

November 1938

APPENDIX

STATUTES INVOLVED

Judicial Code, Section 24, Par. 20th, as amended by the Act of February 24, 1925, 43 Stat. 972:

The district courts shall have original jurisdiction as follows:

* * *

* * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority of any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 1103:

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regula-

tions of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 606:

(a) The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in ac-

cordance therewith, shall not be annulled, modified, set aside, or disregarded.

Section 607:

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 609:

(a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

Revenue Act of 1926, c. 27, 44 Stat. 2:

Section 284:

(a) Where there has been an overpayment of any income, war-profits, or excess-profits, tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

FILE COPY

Office - Supreme Court, U. S.
JAN 30 1939
CHARLES ELMORE

No. 437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

UNITED STATES OF AMERICA, PETITIONER

v.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY, A CORPORATION, DEBTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Summary of argument	5
Argument:	
The District Court had jurisdiction, the reason for retention of the taxpayer's money being a matter only of defense, not a matter of power to entertain the suit	6
Conclusion	31
Appendix:	
Statutes involved	32

CITATIONS

Cases:

Page

American Steam Conveyor Corp. v. *United States*, 10 F. Supp. 571, certiorari denied, 296 U. S. 599 16

American Woolen Co. v. *United States*, 18 F. Supp. 783, 21 F. Supp. 125 ..... 22, 27

Binderup v. *Pathe Exchange*, 263 U. S. 291 19

Boston & M. Consol. C. & C. Min. Co. v. *Montana Ore Purchasing Co.*, 188 U. S. 632 19

Bull v. *United States*, 295 U. S. 247 14

Burnet v. *Desmornes y Alvarez*, 226 U. S. 145 ..... 7, 8

Dixie Margarine Co. v. *United States*, 12 F. Supp. 543, certiorari denied, 297 U. S. 713 28

Eastman Kodak Co. v. *United States* (Ct. Cls.), 13 F. Supp. 435, certiorari denied, 299 U. S. 581 26

The Fair v. *Kohler Die & S. Co.*, 228 U. S. 22 ..... 19, 21

Fauntleroy v. *Lum*, 210 U. S. 230 ..... 7, 9

First National Bank of Beaver Falls v. *United States* (Ct. Cls.), 8 F. Supp. 484, 9 F. Supp. 424, certiorari denied, 294 U. S. 717 25

Flanders v. *Coleman*, 250 U. S. 223 19

Gans S. S. Line v. *Bowers* (C. C. A. 2d), 82 F. (2d) 181, certiorari denied, 298 U. S. 676 15

General Invest. Co. v. *New York C. R. Co.*, 271 U. S. 228 8

Gregory v. *Van Ee*, 160 U. S. 643 7

Guettel v. *United States* (C. C. A. 8th), 95 F. (2d) 229 ..... 7, 10

Gully v. *First National Bank*, 299 U. S. 109 19

Hammond-Knowlton v. *Hartford Connecticut Trust Co.* (C. C. A. 2d), 89 F. (2d) 175 25

Hart v. *Keith Vaudeville Exchange*, 262 U. S. 271 19

Healy v. *Sea Gull Specialty Co.*, 237 U. S. 479 ..... 19, 20

Helvering v. *Taylor*, 293 U. S. 507 8

Jelke Co. v. *Smietanka* (C. C. A. 7th), 86 F. (2d) 470, certiorari denied, 300 U. S. 669 25

Lewis v. *Reynolds*, 284 U. S. 281 ..... 10, 25, 29

Libby, McNeill & Libby v. *United States* (Ct. Cls.), 9 F. Supp. 673 ..... 21, 27

Louisville & N. R. Co. v. *Motley*, 211 U. S. 149 ..... 19, 21

Lowe Bros. Co. v. *United States*, 304 U. S. 302 ..... 6, 10

McCarl v. *United States ex rel. Leland* (App. D. C.), 42 F. (2d) 346, certiorari denied, 282 U. S. 839 11

McEachern v. *Rose*, 302 U. S. 56 ..... 14, 24

Moore Ice Cream Co. v. *Rose*, 289 U. S. 373 27

Morehead v. *New York ex rel. Tipaldo*, 298 U. S. 587 8

Moses v. *United States* (C. C. A. 2d), 61 F. (2d) 791, certiorari denied, 289 U. S. 743 ..... 20, 25

Osborn v. *The Bank of the United States*, 9 Wheat. 738 19

Pacific Electric R. Co. v. *Los Angeles*, 194 U. S. 112 19

Parks & Woolson Mach. Co. v. *United States*, 58 F. (2d) 868, certiorari denied, 287 U. S. 634 16

Patton v. *Brady*, 184 U. S. 608 10
Pratt & Whitney Co. v. *United States* (Ct. Cls.), 6 F. Supp. 574, 10 F. Supp. 148, certiorari denied, 295 U. S. 760 25
Rosenstadt & Waller v. *United States*, 7 F. Supp. 287 16
Smietanka v. *Indiana Steel Co.*, 257 U. S. 1 10
R. H. Stearns Co. v. *United States*, 291 U. S. 54 23
Stone v. *White*, 301 U. S. 532 ..... 25, 29
Tucker v. *Alexander*, 275 U. S. 228 7
United States v. *Bertelsen & Petersen E. Co.* (C. C. A. 1st), 95 F. (2d) 867, 98 F. (2d) 132 (now pending on writ of certiorari, No. 416, October Term 1938) 16, 21, 25
United States v. *Botany Worsted Mills* (C. C. A. 3rd), 98 F. (2d) 880 ..... 15, 27
United States ex rel. Cole v. *Helvering*, 73 F. (2d) 852 12
United States v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269 ..... 7, 20
United States v. *First Wisconsin Trust Co.* (C. C. A. 7th), 92 F. (2d) 840 25
United States v. *Gallagher Co.* (C. C. A. 6th), 83 F. (2d) 368 15
United States ex rel. Girard Co. v. *Helvering*, 301 U. S. 540 ... 6, 14, 23, 29
United States v. *Jaffray*, 97 F. (2d) 488 1
United States v. *Reeves Bros. Co.* (C. C. A. 6th), 83 F. (2d) 121, certiorari denied, 299 U. S. 573 15
United States v. *Swift & Co.*, 282 U. S. 468 14
Untermeyer v. *Bowers* (C. C. A. 2d), 79 F. (2d) 9, certiorari denied, 296 U. S. 641 25
Webster v. *Fall*, 266 U. S. 507 15
Wolverine Petroleum Corp. v. *Commissioner* (C. C. A. 8th), 75 F. (2d) 593 7

Statutes:

Judicial Code, as amended:
Sec. 24 (20) (U. S. C., Title 28, Sec. 41) 32
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 284 (a) (b) 7, 11, 35
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 606 (U. S. C., Title 26, Sec. 1660) 18, 33
Sec. 607 (U. S. C., Title 26, Sec. 1670) 29, 34
Sec. 609 (U. S. C., Title 26, Sec. 1675) 29, 34
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 274 (a) 17, 32
Sec. 322 (a) 11
Sec. 1103 (a) 25, 33
Revised Statutes:
Sec. 3226, as amended (U. S. C., Title 26, Sec. 1672) 7, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 437

UNITED STATES OF AMERICA, PETITIONER

v.

C. T. JAFFRAY, R. H. M. ROBINSON, AND S. M. ARCHER, AS TRUSTEES OF THE ESTATE OF MINNESOTA AND ONTARIO PAPER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the District Court (R. 103-127) is not reported. The opinion of the Circuit Court of Appeals (R. 346-354) is reported in 97 F. (2d) 488.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 29, 1938. (R. 355.) A petition for rehearing (R. 355-357) was denied July 25, 1938 (R. 358). The petition for a writ of certiorari was filed October 25, 1938, and was granted November 21, 1938. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where claims for refund of more than $10,000 in taxes overpaid for several years are disallowed and suit is thereupon brought in the District Court to compel the refund, whether jurisdiction to hear the suit is lost by reason of the circumstance that the only defense relied on is that taxes were owing for other years and that the overpayments have been credited against such other taxes.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, p. 32.

STATEMENT

During all the years herein mentioned Minnesota and Ontario Paper Company was for income-tax purposes affiliated with several other corporations, and with them filed consolidated returns. (R. 78, 134.)[1] The returns filed for the years 1922 to 1925 each showed a substantial tax owing, which the company paid to one Willcuts, then Collector of Internal Revenue for the District of Minnesota but not in office when this suit was commenced. (R. 78-80, 135-137.)

Later discovering facts indicating overpayment, the company filed claims for refund for each of these same four years. (R. 79-80, 135-137.) Negotiations resulted in a so-called closing agreement, entered into under Section 606 of the Revenue Act of 1928, *infra*, p. 33, and approved by the Secretary of the Treasury on July 7, 1933, wherein the Commissioner of Internal Revenue and the taxpayer and affil-

---

[1] All facts pertinent to this appeal were stipulated. (R. 133-243.) No reference is made to facts bearing upon issues that have been abandoned or which do not appear pertinent to the arguments advanced in this Court.

Where the word "taxpayer" is used, reference is to the company except as the context otherwise indicates.

iated concerns agreed as to the proper amount of tax liability for each of the years 1922 to 1925, and also, with the exception of one item specifically reserved, for each of the three years immediately succeeding. By the agreement it was determined that the company had overpaid the tax for 1922 by $49,318.77, for 1923 by $29,427.69, for 1924 by $23,904.23, and for 1925 by $7,800, and the Commissioner delivered to the company certificates of overassessment so showing. (R. 88, 144, 214-218, 95-97, 145-147.) The overpayments thus agreed upon were determined on the basis of the grounds for refund specified in the claims on file. (R. 97, 147.)

As provided by Section 3226 of the Revised Statutes as amended by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33, the Commissioner on August 31, 1933, mailed the taxpayer written notice that its claims for refund for 1922 to 1925 "were disallowed to the extent indicated" in the certificates of overassessment. (R. 97, 146, 239-240.) The certificates in turn stated that the overpayments were "refunded or credited" as therein indicated, and then showed that the overpayments, together with the interest thereon, were not being refunded but were instead being credited to taxes claimed to be owing for other years. (R. 95-97, 145-146, 219-233.) Thereupon the respondents, trustees of the estate of the company, then and now debtor in reorganization proceedings under Section 77B of the Bankruptcy Act (R. 77, 134), began this suit to enforce the claims for refund of the overpayments, together with interest thereon.[2]

---

[2]Suit was brought in August 1934. (R. 15, 109.) Respondent Archer was not appointed trustee until September 29, 1934. (R. 77, 134.) He was joined as plaintiff by order dated February 14, 1935. (R. 53-54.) Between July 11, 1934, and September 29, 1934, respondents Jaffray and Robinson were temporary trustees. (R. 77, 134.)

Originally the suit sought refund also of $7,758.58 paid to the Collector for 1928. (R. 12.) However, computations made by the trial court (R. 126) dem-

All the foregoing was alleged in the petition. (R. 1-6.) The petition did not stop there, however, but instead proceeded to allege the reasons advanced by the Commissioner for his refusal to return the money and why such reasons were not well-founded. It set out (R. 5-6, 10-12), as the record shows and the trial court found (R. 84-87, 95-97, 141-143, 145-146), that the overpayments were applied as credits against income taxes claimed to be owing for 1926 to 1928 on account of the one item specifically reserved in the closing agreement, and that interest on the overpayments was applied in part as a credit against withholding taxes claimed to be owing for 1921, the balance being applied as credits against similar taxes for 1930 and 1931. The withholding taxes for 1930 and 1931 were concededly owing and hence no attack was made upon the credits to those years. As to the other credits, however, the petition alleged further facts (R. 6-14), also shown by the record and found by the trial court (R. 80-84, 89-95, 137-141, 147, 270-280), designed to establish that no income taxes were lawfully owing for 1926 to 1928 and that no withholding taxes were lawfully owing for 1921.[3]

---

onstrated that this amount was properly owing regardless of the validity of the ground for refund urged in the claim filed with respect thereto. Demand for refund of this amount was therefore abandoned, and we make no further reference to it.

[3]The taxes for 1926 to 1928 were attacked on the merits only. With respect to the 1921 tax, the petition alleged invalidity on several grounds. One of them related to whether the statute of limitations had run against collection, all the others going to the merits. (R. 12-14, 119.) The conclusion of the trial court that the credit to 1921 was invalid was based solely on the merits (R. 102, 118-123), no ruling whatever being made on the question of collectibility (R. 123-124). The Government did not contest this portion of the trial court's decision before the Circuit Court of Appeals. However, in its brief in that court (pp. 34, 54, 55, 66) it conceded that the withholding taxes were barred. It follows that as the record now stands the credit to 1921 was invalid both because no taxes were ever lawfully owing for that year and because collection was barred.

Upon the merits the trial court found substantially for the taxpayer. It held as a consequence that to the extent the deficiencies for 1921, 1926, 1927, and 1928 were erroneously determined the Commissioner had no lawful right to apply the overpayments thereto as credits and therefore was without lawful right to refuse to return the company's money, and ordered that to such extent the overpayments for 1922 to 1925 should be refunded. (R. 98-103.) Upon appeal the judgment of the District Court was ordered modified in so far as necessary to give effect to a holding by the Circuit Court of Appeals that the deficiencies for 1926, 1927, and 1928 were in part properly determined, and as so modified was affirmed. (R. 347-354.)

The correctness of the conclusions of the Circuit Court of Appeals upon the merits is not disputed by the Government in this Court. The only question here presented is whether the District Court had power to hear the suit.

SUMMARY OF ARGUMENT

Section 24 (20) of the Judicial Code is the only jurisdictional statute. Under it the District Courts have jurisdiction of suits to recover internal-revenue taxes if it appears (1) that the taxes were collected by a collector of internal revenue, and (2) that the collector is out of office when suit is commenced. Both requirements were met at bar, and it follows that the District Court had power to entertain the proceeding.

The Government's argument goes not to jurisdiction but to whether respondents' cause of action for recovery of the overpayments for 1922 to 1925 was destroyed by the Commissioner's act in crediting such overpayments to the taxes assessed for 1921, 1926, 1927, and 1928, which taxes were not legally owing.

The Commissioner's act in making the credits did not destroy respondents' cause of action. It was not conclusively correct, as petitioner contends, but only presumptively so—a defense which the Government was free to interpose to defeat refund but which respondents were equally free to attack as invalid since the assessments thereby satisfied were for taxes not legally owing. The authorities are uniform to this effect, and this Court has indicated that its view is the same. *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 542-543. A contrary holding would make the Commissioner master in respect of jurisdiction of the District Courts and permit him to defeat every suit for refund, however meritorious, by the simple expedient of determining a deficiency for another year and crediting the overpayment thereto, even after the taxpayer has commenced his proceeding.

ARGUMENT

THE DISTRICT COURT HAD JURISDICTION, THE REASON FOR RETENTION OF THE TAXPAYER'S MONEY BEING A MATTER ONLY OF DEFENSE, NOT A MATTER OF POWER TO ENTERTAIN THE SUIT

The suit is one for the recovery of internal-revenue taxes illegally collected for the years 1922 to 1925. The District Court's jurisdiction to hear it is therefore governed by Section 24 (20) of the Judicial Code as amended, *infra*, p. 32, which provides that where, as here, the amount claimed exceeds $10,000, the District Court shall have jurisdiction if the following two facts appear: (1) that the taxes were collected by a collector of internal revenue; and (2) that such collector was out of office when the proceeding was commenced. See *Lowe Bros. Co.* v. *United States*, 304 U. S. 302, 305-306. Both requirements were met here: (1) the taxes were collected by Willcuts, collector of internal

revenue for the District of Minnesota, and (2) Willcuts was not in office when the suit was begun. (R. 1, 2-4, 78-80, 135-137.) The manifest conclusion is that the trial court had power to entertain the proceeding.[4]

That there was full compliance with Section 24 (20), the Government does not dispute. Since no other statute is pertinent, and since jurisdiction of the inferior Federal courts is attributable solely to Congressional enactment (*Gregory* v. *Van Ee*, 160 U. S. 643, 646), it seems that the matter should end there. It appears, however, that that is

---

[4]While jurisdictional requirements are governed by Section 24 (20), certain other conditions, essential to maintenance of suit when insisted on but not jurisdictional in character (see *Tucker* v. *Alexander*, 275 U. S. 228, 231, and *Guettel* v. *United States* (C. C. A. 8th), 95 F. (2d) 229, 231. Cf. *Fountleroy* v. *Lum*, 210 U. S. 230, 234-235, and *Burnet* v. *Desmornes y Alvarez*, 286 U. S. 145, 147-148), are imposed by Revised Statutes, Section 3226, as amended by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33. In the interest of clarity we show compliance with such other conditions also:

a. Claims for refund must have been filed. They were. (R. 3-4, 79-80, 135-137.)

b. They must have been filed within the times prescribed by Section 284 (b) of the Revenue Act of 1926, *infra*, p. 35. There was compliance here as respects the amounts of which refund is sought. (R. 78-80, 103, 135-137, 347.) This the Government conceded in its brief (p. 7) in the Circuit Court of Appeals.

c. The suit must not have been brought within six months of the filing of the claims since the Commissioner during that period rendered no decision on the claims. Much more than six months expired before suit was begun. (R. 50, 78-80, 135-137.)

d. The suit must have been commenced within two years after the mailing of notice of disallowance of the claims. Such notice was mailed August 31, 1933 (R. 97, 146, 239-240); the suit was begun August 29, 1934 (R. 50).

e. Recovery must be sought on grounds specified in the claims. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269. That is the case here; the claims specified grounds on the basis of which the overpayments agreed upon in the closing agreement (R. 88, 214-218) were determined. (R. 97, 147.) The agreement is of course conclusive in the absence of fraud, malfeasance, or misstatement of material fact, and by it the parties not only dispensed with the necessity of but also precluded alleging and proving the grounds specified in the claims. *Wolverine Petroleum Corp.* v. *Commissioner* (C. C. A. 8th), 75 F. (2d) 593, 595-596. See also R. 69, 104-105.

not the case, but such controversy as persists is altogether non-jurisdictional in character.[5]

If we read aright, what the Government contends is that the taxpayer was without a cause of action for 1922 to 1925 because the Commissioner, while not denying that wrongful collection of taxes had been made for those years, applied the overpayments against taxes he claimed were owing for other years. (Br. 13.) But the question whether there was a cause of action goes, not to the power of the court to hear the controversy, but to the merits—to whether, in granting relief, the court properly discharged its duty in deciding the case. As this Court said in *General Invest. Co.* v. *New York C. R. Co.*, 271 U. S. 228, 230:

> By jurisdiction we mean power to entertain the suit, consider the merits and render a binding decision thereon; and by merits we mean the various elements which enter into or qualify the plaintiff's right to the relief sought. There may be jurisdiction and yet an absence of merits * * *.

To the same effect is *Burnet* v. *Desmornes y Alcarez*, *supra*, an action for filiation wherein the question was at issue whether certain statutes were jurisdictional which prohibited suit unless brought within certain defined periods. The opinion states (p. 147):

> Whether prescription goes only to the remedy or extinguishes the right, it affects the jurisdiction no more than any other defense. When a court has general juris-

---

[5] It is indeed anomalous, after having sought and gained review in this Court solely on the question of jurisdiction, that nowhere in its entire argument does the Government once cite or refer to the only statute by which jurisdiction is conferred and governed.

The question whether under the complaint or upon the facts found plaintiffs were possessed of a cause of action for 1922 to 1925 was not included in the petition for certiorari. Cf. *Morehead* v. *New York ex rel. Tipaldo*, 298 U. S. 587, 604-605, and *Helvering* v. *Taylor*, 293 U. S. 507, 511-512.

> diction to try the question whether an alleged right exists, the rules that determine the existence of the right ordinarily govern the duty only of the court, not its power. * * * Even words in a statute that might seem to affect the power of the court, such as "no action shall be brought," in the statute of frauds, are assumed without question merely to fix the law by which the court should decide * * *.
>
> But it is said that, whether the statutes go to the jurisdiction or not, they establish a condition precedent. Of course, all defenses disclose conditions precedent to the successful maintaining of the action; but more than that must be meant * * *.

In like manner it was said in *Fauntleroy* v. *Lum*, *supra* (pp. 234-235):

> No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has power to do it, and, if it does, the judgment is unimpeachable, unless reversed. Yet a statute could be framed that would make the power, that is, the jurisdiction, of the court, dependent upon whether there was a consideration or not.

Jurisdiction under Section 24 (20) is in no way dependent upon whether credit has been made of the taxes for whose recovery suit is brought. The statute is its own criterion and it contains no such limitation. What the Commissioner does with the money conceivably may bear on the right to ultimate relief, but it does not deprive the court of the power to hear and decide. Whether the taxpayer had a cause of action is something apart from the question of jurisdiction;

the two are distinct under Section 24 (20), and answering the one does not dispose of the other.

But whether or not the question of existence of a cause of action is jurisdictional in character, petitioner's argument on the point proceeds from patent fallacy. It is builded on the assumption (Br. 13) that after credit of the overpayments for 1922 to 1925 plaintiffs could no longer have a cause of action for those years.[6] That assumption, we submit, is wholly unwarranted.

Plaintiffs' cause of action was and is the act of the collector in collecting more taxes for 1922 to 1925 than the law exacted. *Patton* v. *Brady*, 184 U. S. 608, 613-615; *Smietanka* v. *Indiana Steel Co.*, 257 U. S. 1, 4; *Lewis* v. *Reynolds*, 284 U. S. 281, 283; *Lowe Bros. Co.* v. *United States*, *supra*, p. 306; *Guettel* v. *United States*, *supra*, p. 230. It persists until the taxpayer has received full and proper restitution. The circumstance that the overpayments are credited to taxes claimed to be owing for other years may or may not effect such restitution, depending upon whether the taxes so claimed were in truth owing. But that is a question as to which the Commissioner has no ultimate fiat. Indeed, even if they were owing, it does not follow that suit might not thereafter be brought in respect of the years of overpayment, and there is in the decisions neither statement nor intimation to the contrary. As the Govern-

---

[6]The Government says at the same time (Br. 13) that the act of credit "cannot give rise to a cause of action". If after that act the taxpayer has no cause of action for the year of overpayment to the collector, and if that act does not in turn create another, then obviously the taxpayer has no cause of action at all, for collection and credit are the only two things of which the taxpayer could possibly complain. This conclusion is of course the inevitable concomitant of the assertion (Br. 11) that the making of a credit is the Commissioner's "absolute right"; what a man has an "absolute right" to do can give another no cause for complaint.

ment points out (Br. 9), each taxable year stands by itself, and the act of crediting to one year does not obliterate or in any sense eliminate or destroy the fact of overpayment as to the other; quite the reverse, it acknowledges that fact, for otherwise there would be nothing to credit. The overpayment remains, and so does the cause of action springing therefrom; the credit elsewhere is simply a defense available in a proceeding to enforce its return.

It detracts not to point out, as does petitioner (Br. 11), that by Section 284 (a) of the Revenue Act of 1926, *infra*, p. 35,[1] it is provided that an overpayment "shall • • • be credited" against other taxes "then due". If credit is by this statute obligatory, it is obligatory only as respects other taxes "then due", and, ultimately, taxes "due" are only those which the law declares are due, not those by the Commissioner determined to be due. Determination or assessment of a deficiency is merely evidence that in the Commissioner's judgment the law demands more of the taxpayer than he has paid. But the Commissioner's judgment may be wrong. If it is, credit of the overpayment to the deficiency is an unlawful act, just as is cash collection of an ill-advised deficiency, and Section 284 (a) does not make it otherwise.

All that the law does is say that what the Commissioner declares is right and lawful shall be deemed right and lawful until the contrary is made to appear. For example, in *McCarl* v. *United States ex rel. Leland* (App. D. C.), 42 F. (2d) 346, certiorari denied, 282 U. S. 839, the Commissioner determined an overpayment for 1919 and a deficiency

---

[1]The Government refers to Section 322 (a) of the Revenue Act of 1932, but Section 322 seems to relate only to overpayments of taxes imposed by that Act. The corresponding provision relating to overpayments of taxes imposed for the years 1922 to 1925 appears to be Section 284 (a) of the Revenue Act of 1926.

for 1918. The taxpayer appealed to the Board of Tax Appeals from the deficiency, and while review was pending there brought mandamus to compel refund of the overpayment. This latter procedure was not permissible, and in the course of so holding the court said (p. 347):

> The ruling as to the deficiency assessment was prima facie correct. * * * [Citing cases.] Prima facie, therefore, the amount of the deficiency assessment was "then due" the government, but owing to the appeal taken by the taxpayer the final balancing of the account could not be had until the termination of the appeal.
>
> In our view it was the intent of Congress in the enactment of Section 284 to require immediate refund of overpayments only in the event of a net balance in favor of the taxpayer. * * *

A generally analogous situation was dealt with by the same court in *United States ex rel. Cole* v. *Helvering*, 73 F. (2d) 852. The *McCarl* case was referred to, and of it the court said (p. 853):

> We ruled that prima facie at the time the Commissioner made the determination the amount of the deficiency assessment was "then due", but that owing to the taxpayer's appeal final balancing of the account could not be had until the determination of the appeal.

Obviously the right of the Commissioner to credit an overpayment for one year to a deficiency or assessment for another is a conditional right, not an absolute one, and the Government itself so states elsewhere in its brief (See Br. 35, bottom.) The Commissioner's determination that there is a deficiency is itself only presumptively correct, and it is illogical to suppose that satisfaction of the deficiency by credit has attached to it any greater degree of finality. It seems hard to believe that enlightened jurisprudence would accept the suggestion that the quality of finality inheres

in an *ex parte* act of the Commissioner and that thereby the taxpayer is denied the right to be heard with respect to its validity for any purpose, subject only to a right to resort to another proceeding involving still another tax year. Whether the deficiency is owing is a matter of defense, not of jurisdiction, when suit is brought for refund of the overpayment. Validity of the deficiency is then determinable, provided, of course, contrary to what was true in the *McCarl* case, jurisdiction to review the deficiency has not already been acquired by another tribunal. If the deficiency is lawfully owing, then to that extent the overpayment may be retained, and all the taxpayer is entitled to have refunded is the "net balance", if any. Plainly the question of credit goes to defense, not to jurisdiction. As the trial court said in this case (R. 106):

> The fact that the overpayment has been credited upon an alleged deficiency may properly be assigned as a reason why the tax was not refunded, and if the application upon the alleged deficiency was warranted by law, then, of course, there is an absolute defense to any action that may be brought to recover the overpayment; but the refusal to return the overpayment remains. If, for instance, a claim for refund was filed and no decision was made by the Commissioner within the six months' period, then the claimant, under the statute, could bring suit. Certainly, if suit were brought under these circumstances, a defense that the taxpayer's position was correct, but that the overpayment had been applied to a deficiency of another year, would not justify a dismissal of the action. The mere asserted defense would not dispose of plaintiff's cause of action and require him to drop his suit and file a claim for refund for the years to which the credit had been applied. Such a defense would simply constitute a reason why the overpayment had not been returned, and if the application

was lawful, such a defense would dispose of the merits of the controversy.

See also *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543. Cf. *McEachern* v. *Rose*, 302 U. S. 56.[8]

This is patently sound reasoning, and in this connection it may be pointed out that so far as we are aware there is not a single authoritative decision in which it has ever been held, or even remotely suggested, that under facts such as those at bar refund may be sought only as to the years to which the overpayments are credited and that suit will not lie to recover the overpayments themselves, the theory pursued here. Certainly neither case cited by petitioner so holds.

It is true that in *United States* v. *Swift & Co.*, 282 U. S. 468 (Br. 18-19), the suit was brought for refund of an overpayment collected by credit (p. 469), but the sole question there discussed and decided related to the effective date of such collection; so far as the opinion indicates, no consideration whatever was given to whether suit for the year of overpayment by credit was proper, much less to whether the taxpayer could have sued for the year of overpayment in cash. Perhaps it is fair to indulge the presumption that this Court regarded, or at least assumed, that the procedure followed was permissible, but that is vastly dif-

---

[8]The foregoing is in no way opposed to what this Court said in *Bull* v. *United States*, 295 U. S. 247, 259-260, as the Government implies (Br. 9-10). We read the statement in that case (p. 260) that "The assessment is given the force of a judgment" as being limited to purposes incident to initial collection. And if an assessment is an absolute and irrevocable determination that taxes are then due "regardless of the correctness of the assessment" (Br. 9-10), this Court would never there have said (p. 260) that the United States "took more than it was entitled to" or that "Retention of the money was against morality and conscience."

If an assessment were anything more than a *prima facie* determination that taxes are due, then of course the Commissioner could never lawfully abate an assessment.

ferent from saying that its decision is authority for the proposition that that procedure was exclusive and that the taxpayer could not have sued for the years of original overpayment—an issue not even in the case. The *Swift* decision does not support petitioner's position; the question did not so much as lurk in the record. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511.

Perchance it is not going too far to say that the question did lurk in the record in *United States* v. *Botany Worsted Mills* (C. C. A. 3d), 98 F. (2d) 880 (Br. 19-20). But a reading of the opinion in that case demonstrates unmistakably (p. 883) that the decision there was made to turn, not on any jurisdictional issue, but on interpretation of the statute governing interest—whether the taxpayer should be permitted to receive an advantage over other taxpayers in all respects similarly situated except for the circumstance that their refunds were made at an earlier date.[9]

As already stated, so far as we have been able to ascertain there is no decision which by express holding is in conflict with the conclusion reached below. It is true that there are several cases in which it has been held that the taxpayer upon facts analogous to those at bar has a cause of action for the years to which the overpayments are applied as credits,[10] but in none of them is it declared that there is no

---

[9]The court in the *Botany* case did in the course of its opinion make the statement (p. 883) that the credit there made "must be regarded as a valid closing of the accounts between the Government and the taxpayer so far as the overpayment of 1918 tax was concerned." It would be a curious doctrine indeed which would permit one of two parties to a transaction, over the other's protest, to make a disposition of his money which, even though unlawful, would nevertheless constitute a binding closing of accounts between them.

[10]To this category belong such cases as *United States* v. *Gallagher Co.* (C. C. A. 6th), 83 F. (2d) 368, *United States* v. *Reeves Bros. Co.* (C. C. A. 6th), 83 F. (2d) 121, certiorari denied, 299 U. S. 573, and *Gans S. S. Line* v. *Bowers* (C. C. A. 2d), 82 F. (2d) 181, certiorari denied, 298 U. S. 676.

cause of action for the years of original overpayment or that the District Courts are without power to entertain suits for such years. On the other hand, *United States* v. *Bertelsen & Petersen E. Co.* (C. C. A. 1st), 95 F. (2d) 867, 98 F. (2d) 132 (now pending on a writ of certiorari, No. 416, October Term 1938), is in complete accord with the decisions below, holding specifically (95 F. (2d) 868, 98 F. (2d) 135) that District Courts have jurisdiction in cases of this kind and that it is proper to sue for the years of overpayment in cash. And the Court of Claims has gone so far as to hold, consistently, that those are the only years for which suit may be brought. *Parks & Woolson Mach. Co.* v. *United States,* 58 F. (2d) 868, certiorari denied, 287 U. S. 634; *Rosenstadt & Waller* v. *United States,* 7 F. Supp. 287; *American Steam Conveyor Corp.* v. *United States,* 10 F. Supp. 571, certiorari denied, 296 U. S. 599.[11]

---

[11]In connection with citation of the *Swift* case and as support for its contention that respondents have no cause of action for 1922 to 1925, petitioner makes the statement (Br. 19) that "it is impossible for a single sum paid by a taxpayer to be an overpayment in that sum for two different taxable years." The Court of Claims agrees with that statement but takes sharp issue with the conclusion that the year of overpayment must be the year of collection by credit rather than the year of collection in cash. In the *Rosenstadt* case it said (pp. 288-289):

"A credit is always the result of a prior payment on a tax and if, when the credit was made, it was declared to be a payment on another tax there would be two payments on different years, although only one sum had been received by the government, at one time, and for one purpose. * * * it is not reasonable to assume that Congress intended to provide that when a credit is made of an overpayment the period of limitations for its recovery is thereby extended, thus giving an advantage to the taxpayer if an attempt has been made to make a credit over the taxpayer whose overpayment has not been credited."

If respondents could bring suit only for 1921, 1926, 1927, and 1928, then under the decision in the *Lowe Bros.* case, *supra,* the only forum with jurisdiction to hear and decide would have been the Court of Claims, and petitioner intimates (Br. 18) that respondents should have gone there. Had that been done, respondents would of course have been turned out of court without a hearing on the merits. Whether the Court of Claims is right or wrong is beside the point, and need not be decided in this case. As a practical matter,

What appears to lead the Government astray is the circumstance, repeatedly adverted to in the Government's brief (pp. 8, 14, 15) that, as the case developed, there was no controversy between the parties as to whether the taxpayer had overpaid its taxes for 1922 to 1925, but only as to whether it had overpaid its taxes for 1921 and for 1926 to 1928; hence, concludes the Government, it must be true that the taxpayer had no cause of action for the former years. We submit that the conclusion is an obvious *non sequitur.*

As already stated, the primary wrong of which respondents complain is the collection of a greater amount in taxes for 1922 to 1925 than the law exacted. But that point, important as it is, is not the thing that is ultimately dispositive. Of course the issue of whether there was in fact an excessive collection is one the affirmative of which the taxpayer had to prove and did prove as part of its case, and the Government elected not to dispute it. But that is nevertheless not the final issue. The final issue always has been and still is whether, having established the fact of overpayment of taxes, the taxpayer is entitled to their refund. The taxpayer says it is; the Government contends the con-

---

however, the only years as to which respondents could bring suit with prospect of being able to have the wrongs done them corrected were the years 1922 to 1925. Of course, with respect to suit for those years, the argument advanced by the Government would apply with equal force whether the suit were brought in the Court of Claims or in the District Court; which shows that the argument is in reality not one going to jurisdiction.

The Government intimates (Br. 10) that notices of deficiency were sent to the taxpayer with respect to 1921, 1926, 1927, and 1928 before the assessments for those years were made, and that respondents had an opportunity to contest the liability asserted for those years by filing petitions for review with the Board of Tax Appeals. Notices of deficiency were never issued and no such course of procedure was ever open to respondents because the taxpayer was in receivership and, later, in bankruptcy. See Section 274 (a) of the Revenue Act of 1932, *infra*, p. 32. Of course no claims for those years were ever filed in the receivership or bankruptcy proceedings.

trary. That is the ultimate controversy, and it is a controversy in respect of taxes paid for 1922 to 1925.

It is wholly without significance that the complaint itself shows that the overpayments for 1922 to 1925 were applied as credits against the taxes claimed for 1921, 1926, 1927, and 1928, and that the Government made no attempt to dispute the allegation that overpayments had been made, either because it was without or simply elected not to interpose any defense to such allegation, but instead did no more than assert that it had a right to withhold the money in satisfaction of the taxes claimed for the other years—an assertion which it is now determined was without foundation. It is sufficient answer to point out that jurisdiction is neither acquired nor lost by reason of the number or character of the defenses interposed on the merits. Suppose, for example, that petitioner had denied the fact of overpayment and, in the first instance, had done nothing more.[12] In that event the existence of jurisdiction would have been obvious, and presumably the Government would so concede. If upon trial, however, the proof adduced by the complainants had been sufficiently imposing to induce the Government to abandon that defense and to urge instead that the overpayment had been credited to other years, no one would suppose that the exigencies of the Government's position could have had so far-reaching an effect as to have compelled the court to dismiss on the ground that its authority to hear

---

[12]Petitioner seems to assume (Br. 14-15) that it would have had no right to make such denial, on the ground that the fact of overpayment was established by the closing agreement. There is no warrant for any such assumption. The closing agreement would simply bear on the ultimate efficacy of the denial, not on the right to make it; before the Government could make its denial effective it would have the burden of establishing that the agreement was for some reason inoperative. See Section 606 of the Revenue Act of 1928, *infra*, p. 33.

terminated upon collapse of the first defense. Clearly, as the courts below pointed out (R. 106, 351), the fact of credit is a matter of defense, not of jurisdiction. As said as long ago as *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 824:

> The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. • • •

Whether a court has jurisdiction to hear a case is determined, in the first instance at least, by the allegations of the bill of complaint. *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 305-308; *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, 273; *Flanders* v. *Coleman*, 250 U. S. 223, 227, 228; *Pacific Electric R. Co.* v. *Los Angeles*, 194 U. S. 112, 118. But in examining a complaint with a view to such determination, it is established law that only those allegations will be considered as are confined to a statement of the plaintiff's cause of action. *Gully* v. *First National Bank*, 299 U. S. 109, 113; *Healy* v. *Sea Gull Specialty Co.*, 237 U. S. 479, 480; *The Fair* v. *Kohler Die & S. Co.*, 228 U. S. 22, 25; *Louisville & N. R. Co.* v. *Mottley*, 211 U. S. 149, 152-154; *Boston & M. Consol. C. & C. Min. Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, 640. As said in the *Gully* case (p. 113):

> • • • the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiffs' cause of action and anticipates or replies to a probable defense. • • •

In the complaint at bar the statement of the plaintiffs' cause of action consists essentially and solely of the allegations that taxes were collected for 1922 to 1925, that the

taxes collected were excessive, that claims for refund were filed, and that the claims were disallowed or rejected. The complaint could have stopped there, as the court said in *Moses* v. *United States* (C. C. A. 2d), 61 F. (2d) 791, 794, certiorari denied, 289 U. S. 743, with respect to the complaint in that case, and as the District Court here pointed out (R. 69, 62), closing with the allegation that the Commissioner had failed and refused to make the refunds, which, commonly, is the closing allegation by the plaintiff in any suit for refund, and is the circumstance, this Court has said (*United States* v. *Felt & Tarrant Mfg. Co.*, *supra*, p. 273), which makes the suit necessary. The remaining allegations —that taxes were claimed for other years, that the Commissioner had credited the overpayments thereto, and that such other taxes were not legally owing—simply anticipated the defense and replied thereto, and were in the nature of surplusage. Since it is upon these latter allegations that the Government bases its contention, and since there was jurisdiction without them, it follows, as already indicated, that the fact of credit has no bearing on the question of the District Court's power to entertain the proceeding. And for the same reason it is equally inconsequential that the dispute as to lawfulness of the taxes claimed for 1921, 1926, 1927, and 1928 and of the credits made thereto may have proved to be more serious than the question of overpayment of taxes for 1922 to 1925. As said in the *Healy* case, *supra*, p. 480:

> • • • the plaintiff is absolute master of what jurisdiction he will appeal to; and if he goes to the district court for infringement of a patent, unless the claim is frivolous or a pretense, the district court will have jurisdiction on that ground, even though the course of the subsequent pleadings reveals other more serious dis-

> putes. • • • Jurisdiction generally depends upon the case made and relief demanded by the plaintiff; and as it cannot be helped, so it cannot be defeated by the replication to an actual or anticipated defense contained in what used to be the charging part of the bill. • • •

In like manner it was said in the *Kohler* case, *supra*, p. 25:

> Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a "suit arising under" the patent or other law of the United States by his declaration or bill. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. • • • Conversely, when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim. • • •

See also *Louisville & N. R. Co.* v. *Mottley*, *supra*, p. 152.

The foregoing considerations render inescapable the conclusion that the Commissioner's act whereby he credited the overpayments to the taxes claimed for the other years goes, not to the question of jurisdiction, but simply to the question of defense, and this is the view to which the courts have consistently adhered. We have already referred to the holding of the courts below in the instant matter and to the decision in *United States* v. *Bertelsen & Petersen E. Co.*, *supra*. We cite here some of the other cases.

In *Libby, McNeill & Libby* v. *United States* (Ct. Cls.), 9 F. Supp. 673, a taxpayer overpaid its 1917 income tax. The Commissioner determined a deficiency for 1919 and to this deficiency credited the 1917 overpayment. After filing a claim for refund of the 1917 overpayment the taxpayer began suit for its recovery, exactly as at bar. The

Government raised precisely the same argument it raises here. Of it the court said (p. 680):

> Counsel for defendant now contend that the plaintiff is not entitled even to this last-named sum for the reason, as we understand the argument, that the overpayment for 1917 had been applied on the deficiency for 1919 and thus had become an overpayment for that year. No application for refund for 1919 was filed and it is therefore contended that the plaintiff can recover nothing. This contention ignores the fact that the plaintiff is suing to recover part of an overpayment on taxes of 1917 for which a refund claim was duly filed. It is true that the Commissioner undertook to apply this overpayment on the deficiency for 1919, but we have held above at the time the Commissioner so acted the 1919 taxes were paid and settled and consequently that the Commissioner could not lawfully make such an application. In other words, his action was a mere nullity. * * *

This short, simple, and obviously sound statement answers irrefutably every contention petitioner makes. The essential facts in the *Libby* case are identical with those at bar, even to the point that collection of the 1919 deficiency was not barred.[18]

In *American Woolen Co.* v. *United States*, 18 F. Supp. 783, 21 F. Supp. 125, 1021, the same court said (18 F. Supp. 788):

> We have held that when a taxpayer has a decision of the Board in his favor he can bring suit thereon. But this does not mean that where the Commissioner has applied an overpayment found by the Board in the manner required by law, the taxpayer can still recover by

---

[18]The Government attempts (Br. 22) to distinguish the *Libby* case on the ground that in that case all taxes owing for the year to which the overpayment was applied as a credit had been paid. That is precisely the situation at bar.

> suit the amount thereof. When the Government shows, as it has in this case, that the amount of the overassessment was credited on a deficiency then due under the decision of the Board, it is a complete defense.

Petitioner says of the *American Woolen* case (Br. 20) that it supports the Government's position rather than that of the taxpayer, presumably on the ground that it was there held that a complete defense is established when it is shown that the overpayment whose refund is sought has been applied as a credit "in the manner required by law". The Government neglects to emphasize that the deficiency there satisfied by credit was not merely presumptively correct, which was the situation at bar, but had been found correct in a judicial determination, which is vastly different. The Government's contention that a taxpayer suing for refund of an overpayment is precluded from questioning the validity of an unreviewed deficiency for another year to which the Commissioner has applied the overpayment as a credit, is clearly at odds with what this Court said in *R. H. Stearns Co.* v. *United States*, 291 U. S. 54, 62-63:

> The burden was on the petitioner, seeking a refund of its tax, to prove its allegation that the overassessment for 1918 had been illegally credited upon the tax for 1917. • • •

That the fact of credit is simply a defense subject to attack by the taxpayer and that the procedure followed at bar is not merely permissible but is the approved course is clear from what this Court recently said *obiter* in *United States ex rel. Girard Co.* v. *Helvering*, *supra*. An overpayment had there been determined by the Board. The taxpayer brought mandamus to compel refund. The Court held that mandamus was not the proper remedy and that

the right to the refund should be determined by bringing a suit for refund. The Court said (pp. 542-543):

> When the determination of overpayment by the Board becomes final, the statute provides that such amounts shall be refunded or credited, Sec. 322 (d), and upon the Commissioner's failure to comply with the statute, a plenary suit will lie in the district court or the Court of Claims, for the recovery of any refund to which he is entitled. See *National Fire Insurance Co.* v. *United States*, 52 F. (2d) 1011, 1013-1014; *James* v. *United States*, 38 F. (2d) 140, 143; *Ohio Steel Foundry Co.* v. *United States*, 38 F. (2d) 144, 148-149. And in such a suit the Commissioner may secure a final adjudication of his right to withhold the overpayment determined by the Board, on the ground that other taxes are due from the taxpayer, or that upon other grounds he is not equitably entitled to the refund. See *Stone* v. *White, supra* [301 U. S. 532]; *Welch* v. *Obispo Oil Co. ante*, p. 190; *Lewis* v. *Reynolds*, 284 U. S. 281; *Crocker* v. *Malley*, 249 U. S. 223.
>
> In view of what we have just decided in *Stone* v. *White, supra*, it is evident that in the circumstances of this case there is no clear duty of the Commissioner to refund the tax without securing a final adjudication of the government's right to retain it, as he may do by interposing an appropriate defense in a suit for the refund.

See also *McEachern* v. *Rose, supra*, p. 59.

What the courts below and what other courts have held in analogous cases is in the above language given unequivocal approval. What the Commissioner does with an overpayment—whether he credits it elsewhere or for other reason retains it—is purely a matter of defense which the Government is free to interpose or not, as it sees fit. Upon the question of jurisdiction it has no bearing. In a suit for refund a taxpayer is not required in the first instance to

prove that he is not otherwise indebted to the Government before he may recover the overpayment for which suit is brought. *United States* v. *First Wisconsin Trust Co.* (C. C. A. 7th), 92 F. (2d) 840, 845. In the language of the trial court below (R. 69):

> • • • the plaintiffs will have made out a prima facie case in proving the claim for refund that was filed, the facts indicating a refusal on the part of the Government to refund the taxes, and the agreement between the Government and the taxpayer as to the admitted overpayment. The proof by the Government to the effect that the overpayment was applied to a deficiency that existed in prior [other?] years will undoubtedly require the plaintiffs to go ahead with proof and sustain the burden that the Government erred in so applying the overpayment.

See also *Stone* v. *White*, 301 U. S. 532. Cf. *Lewis* v. *Reynolds*, *supra*.[14]

---

[14] In *Untermyer* v. *Bowers* (C. C. A. 2d), 79 F. (2d) 9, certiorari denied, 296 U. S. 641, the taxpayer in a suit against the collector in district court was allowed to recover an overpayment for 1919 which was applied as a credit to 1918; as here, the defendant did not dispute the fact of overpayment. However, the question of "jurisdiction" was not discussed. But it is clear that if the district court had jurisdiction of the suit against the collector it would also have had jurisdiction of the suit had the Government been the defendant.

In none of the following cases was it held or suggested that there was no jurisdiction or cause of action, yet the suits were all brought, or interpreted as being brought, to recover overpayments credited to other years. *Pratt & Whitney Co.* v. *United States* (Ct. Cls.), 6 F. Supp. 574, 10 F. Supp. 148, certiorari denied, 295 U. S. 760; *First National Bank of Beaver Falls* v. *United States* (Ct. Cls.), 8 F. Supp. 484, 9 F. Supp. 424, certiorari denied, 294 U. S. 717; *Moses* v. *United States*, *supra*; *Jelke Co.* v. *Smietanka* (C. C. A. 7th), 86 F. (2d) 470, certiorari denied, 300 U. S. 669. In all these cases it was held, under Section 3226 of the Revised Statutes as it stood before its amendment by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33, that the making of the credit is the act that constitutes the disallowance or rejection of the claim for refund of the overpayment. To the same effect is the *Bertelsen & Petersen* case, *supra*, 98 F. (2d) 132. Since the amendment the official act of disallowance is of course the mailing of the letters giving notice of the disallowance, which in this case took place August 31, 1933. (R. 97, 146.)

We believe the Government misuses *Hammond-Knowlton* v. *Hartford Con-*

The wholly illogical character of the Government's contentions is even more evident when we consider their practical implications. Suppose, for example, that the present suit had been brought upon the expiration of six months after the filing of the claims for refund without a decision thereon by the Commissioner and that at that time no credits had been made. Not even the Government would doubt the existence of jurisdiction upon such facts. But suppose that after commencement of suit the Commissioner had then made the credits. Under the Government's theory the suit pending would then have to be dismissed, new claims for refund be filed for the years to which the credits were applied, and after rejection of the claims or the expiration of six months a new suit be instituted for the other years.

To illustrate further. Suppose a taxpayer makes a cash overpayment of his 1935 tax, which the Commissioner credits to a deficiency for 1928. If petitioner's argument be sound, the taxpayer would then have to sue for 1928. Suppose he does so, but that then the Commissioner decides that he was mistaken, that there was no tax due for 1928, instead determines a deficiency for 1931, "reverses" the previous credit, and applies the 1928 overpayment to 1931. Under the Government's theory the taxpayer would then have to drop his suit for 1928 and begin all over again for 1931. The process of reversal, dismissal, and new suit could go on forever. Cf. R. 107. It is not uncommon for the Commissioner to reverse a credit. He did it in *Eastman Kodak Co.* v. *United States* (Ct. Cls.), 13 F. Supp. 435, 451,

---

necticut Trust Co. (C. C. A. 2d), 89 F. (2d) 175, certiorari denied, 302 U. S. 707. The credit referred to in the quotation (Br. 24) was not such a credit as those here under consideration, but the statutory credit against Federal estate taxes allowed by reason of payment of State inheritance taxes or other State death duties.

certiorari denied, 299 U. S. 581; *American Woolen Co.* v. *United States, supra,* 18 F. Supp. 783, 787, 788; *Libby, McNeill & Libby* v. *United States, supra,* pp. 678, 679; *United States* v. *Botany Worsted Mills, supra.* The fact is that even in the instant case overassessments were abated (R. 85-86, 141-142), and the credits finally made were different from those set out in the certificates of overassessment (R. 97, 146). If a taxpayer may sue only for the year to which an overpayment is credited, manifestly the possibilities for wearing him down are just about unlimited.

The fact is that the ultimate implication of the Government's contention is nothing less than appalling. If the Government's position is sound it means that the Commissioner can defeat any and all proceedings for refund by the simple expedient of determining a deficiency for another year, whether arbitrarily or not is beside the point, and by applying thereto as a credit the overpayment for whose recovery suit is brought. A doctrine that leads to that result is a formidable weapon indeed.[15]

What has already been said answers the Government's incidental contention (Br. 18, 24-27) that the present suit is not maintainable since the record does not show that there were claims for refund filed in respect of the years to which the overpayments were credited. Were more necessary, it is sufficient to point out that the requirement that claims be filed is by the governing statute, Section 3226 of the

---

[15]Quite sallow in comparison is the burden which the Government says (Br. 16) will be cast on a collector if the taxpayer is permitted to sue him for the year of overpayment in cash. Moreover, as we all know, a collector has little personal interest in either the defense or the outcome of refund suits in which it happens that his name appears as the defendant. See *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 382-383.

Revised Statutes as amended by Section 1103 (a) of the Revenue Act of 1932, *infra*, p. 33, made a prerequisite only to the bringing of suit, and as such obviously applies only to the years in respect of which suit is brought, in this case 1922 to 1925. Cf. *Dixie Margarine Co.* v. *United States* (Ct. Cls.), 12 F. Supp. 543, certiorari denied, 297 U. S. 713.

Moreover, there would be no point or purpose in a rule requiring the t· .payer to apprise the Government of the character and validity of its own defense, which the Government may or may not raise, as it chooses. The rules of pleading and procedure give the Government all the protection and notice it needs or is entitled to have; if the Government as a defense pleads the fact of credit elsewhere, it is the taxpayer's burden to show, if he can, that the deficiency to which the credit is applied is not lawfully owing. And from the standpoint of practical administration, the issues framed in advance of trial give the Commissioner knowledge amply sufficient to correct his mistakes without entering upon actual contest, if he is so disposed.

The baselessness of the Government's argument is further demonstrated by the fact that if the credit is not made until after suit to recover the overpayment is begun, it would be physically impossible to do what the Government insists is a condition precedent to the bringing of the suit itself.

The Government's allusion to orderly administration of the revenue and to the burden of litigation is quite patently devoid of merit.[16]

The Government submits for determination (Br. 28-37) the question whether the effect of credit of an overpayment

---

[16]As already pointed out, the filing of a claim for refund is a procedural, not a jurisdictional, prerequisite. Note 4, *supra*.

to a deficiency whose collection is barred by the statute of limitations is different from the effect of credit to a deficiency not so barred, and to that end asks for interpretation of Sections 607 and 609 of the Revenue Act of 1928, *infra*, p. 34.

The question is not one in respect of which certiorari was asked or granted, and we understand (Br. 30) that the Court in similar circumstances has declined to deal with the question. Moreover, upon the record at bar the tax claimed for 1921 was not owing upon the merits and so is in a category with the taxes claimed for 1926, 1927, and 1928.[17]

Under the circumstances we do no more than submit a short statement of our view, which we believe coincides with petitioner's.

The effect of Sections 607 and 609 is simply to deprive the Government of a defense by way of set-off which it would otherwise have, and to place such deficiencies in the same category as deficiencies determined despite the fact that all taxes legally owing have been paid. In the absence of some such provisions as those contained in Sections 607 and 609 the Government, in a suit for refund of overpaid taxes, could avail itself, as a set-off, of the fact that other taxes have not been paid, even though such other taxes, because of limitations, would not be collectible in an affirmative proceeding. *Lewis* v. *Reynolds, supra; United States ex rel. Girard Co.* v. *Helvering, supra,* p. 543. Sections 607 and 609 simply withdraw this possible defense to repayment. "They preclude, in a suit by the taxpayer against the collector or the government, reliance on a claim against the taxpayer, barred by statute, as a set-off, or counterclaim." *Stone* v. *White, supra,* p. 538. In other words, they declare

[17]See note 3, *supra.*

that the claim shall be treated as though the taxes represented thereby had never legally been owing, rather than as once owing but rendered uncollectible by limitations. Sections 607 and 609 thus operate to place barred deficiencies in a category with deficiencies not barred but unlawfully determined on the merits.

Under this view collection of the barred deficiency is not "void" in the sense that the situation is the same as though no collection had been made. As in the case of a deficiency that is illegal for the sole reason that the taxes were not owing on the merits, collection of a barred deficiency, whether in cash or by credit, is presumptively correct and lawful until the opposite is made to appear, just as in the present matter collection by credit of the deficiencies for 1921, 1926, 1927, and 1928 was *prima facie* proper until respondents established the contrary.

CONCLUSION

That the District Court had jurisdiction is clear. Petitioner has presented no argument to the contrary, and it sought and was granted review limited to issues jurisdictional in character. The Government's contention goes only to the technical question of existence of a cause of action for the particular years in respect of which suit was brought, it being established that respondents are entitled to prevail upon the merits. In any event, that contention is unsound and is contrary to the view uniformly taken by the authorities.

The judgment of the court below should be affirmed.

Respectfully submitted,

J. B. FAEGRE
HAYNER N. LARSON
Attorneys for Respondents

FAEGRE, BENSON & KRAUSE
Of Counsel

January, 1939

APPENDIX

STATUTES INVOLVED

Judicial Code, Section 24, Par. 20th, as amended by the Act of February 24, 1925, 43 Stat. 972:

> The district courts shall have original jurisdiction as follows:
>
> * * * * * * * * * * * * * * * of any suit or proceeding commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced.

Revenue Act of 1932, c. 209, 47 Stat. 169:

Section 274 (a):

> Upon the adjudication of bankruptcy of any taxpayer in any bankruptcy proceeding or the appointment of a receiver for any taxpayer in any receivership proceeding before any court of the United States or of any State or Territory or of the District of Columbia, any deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) determined by the Commissioner in respect of a tax imposed by this title upon such taxpayer shall, despite the restrictions imposed by section 272 (a) upon assessments be immediately assessed if such deficiency has not theretofore been assessed in accordance with law. Claims for the deficiency and such interest, additional amounts and additions to the tax may be presented, for adjudication

in accordance with law, to the court before which the bankruptcy or receivership proceeding is pending, despite the pendency of proceedings for the redetermination of the deficiency in pursuance of a petition to the Board; but no petition for any such redetermination shall be filed with the Board after the adjudication of bankruptcy or the appointment of the receiver.

Section 1103:

(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

Revenue Act of 1928, c. 852, 45 Stat. 791:

Section 606:

(a) The Commissioner (or any officer or employee of the Bureau of Internal Revenue, including the field service, authorized in writing by the Commissioner) is

authorized to enter into an agreement in writing with any person relating to the liability of such person (or of the person or estate for whom he acts) in respect of any internal-revenue tax for any taxable period ending prior to the date of the agreement.

(b) If such agreement is approved by the Secretary, or the Undersecretary, within such time as may be stated in such agreement, or later agreed to, such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—

(1) the case shall not be reopened as to the matters agreed upon or the agreement modified, by any officer, employee, or agent of the United States, and

(2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded.

Section 607:

Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim.

Section 609:

(a) Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607.

Revenue Act of 1926, c. 27, 44 Stat. 9:

Section 284:

(a) Where there has been an overpayment of any income, war-profits, or excess-profits, tax imposed by this Act, the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, the Act entitled "An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes," approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1921, or the Revenue Act of 1924, or any such Act as amended, the amount of such overpayment shall, except as provided in subdivision (d), be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance of such excess shall be refunded immediately to the taxpayer.

(b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer * * *.

SUPREME COURT OF THE UNITED STATES.

Nos. 416 and 437.—October Term, 1938.

The United States of America, Petitioner, vs. Bertelsen & Petersen Engineering Company. (416)	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
The United States of America, Petitioner, vs. C. T. Jaffray, R. H. M. Robinson and S. M. Archer, as Trustees of The Estate of Minnesota and Ontario Paper Company. (437)	On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 27, 1939.]

Mr. Justice McReynolds delivered the opinion of the Court.

In each of these causes counsel for the United States maintain the District Court was without jurisdiction to determine the issues. The Circuit Courts of Appeal ruled otherwise and approved judgments for respondents. The collectors who received the excess taxes in question were either dead or out of office when the proceedings to recover were commenced. The question of jurisdiction only is open for our consideration.

Section 145 Judicial Code[1] empowers the Court of Claims to hear and determine claims against the United States arising out of contract, express or implied. Prior to 1921 section 24(20) Judicial Code gave District Courts concurrent jurisdiction when the claim did not exceed Ten Thousand Dollars.[2]

[1] Tucker Act March 3, 1887, c. 359, 24 Stat. 505; Act June 27, 1898, c. 503, 30 Stat. 494; July 1, 1898, c. 546, 30 Stat. 597, 649; February 26, 1900, c. 25, 31 Stat. 33; March 3, 1911, 36 Stat. 1087, 1136; U. S. C. A. Title 28, sec. 250(1).

[2] "The district courts shall have original jurisdiction as follows: . . . . Twentieth. Concurrent with the Court of Claims, of all claims not exceeding ten thousand dollars founded upon the Constitution of the United States or

The Acts of 1921, 1924, 1925 and 1926[3] enlarged the jurisdiction of Districts Courts by adding the following to section 24(20) Judicial Code:

"Concurrent with the Court of Claims, of any suit or proceeding, commenced after the passage of the Revenue Act of 1921, for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected, under the internal-revenue laws, even if the claim exceeds $10,000, if the collector of internal revenue by whom such tax, penalty, or sum was collected is dead or is not in office as collector of internal revenue at the time such suit or proceeding is commenced."

Section 3226 Revised Statutes as amended and reenacted by Revenue Act 1926, c. 27, sec. 1113(a), 44 Stat. 9, 116, provides—

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, ... No such suit or proceeding shall be begun . . . after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

Section 3226 was further amended by Act June 6, 1932, c. 209, sec. 1103(a), 47 Stat. 169, 286, so as to read as shown in the margin.[4]

No. 416

The Commissioner of Internal Revenue undertook to deduct more than Ten Thousand Dollars from an admitted overpayment by re-

---

any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, ..."
Act March 3, 1911, 36 Stat. 1087, 1091, 1093; U. S. C. A. Title 28, sec. 41(20).

[3] See Act November 23, 1921, c. 136, 42 Stat. 227, 311; June 2, 1924, c. 234, 43 Stat. 253, 348; February 24, 1925, c. 309, 43 Stat. 972; February 26, 1926, c. 27, 44 Stat. 9, 121. U. S. C. A. Title 28, sec. 41(20).

[4] "Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

Sec. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, . . . until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, ... No such suit or proceeding shall be begun . . . after the expiration of two

spondent upon 1917 taxes and to apply this to a declared deficiency for 1918 taxes then barred by the Statute of Limitations. By this suit respondent seeks a judgment for the amount so deducted.

The Circuit Court of Appeals properly held "this action was brought to recover that part of a claim for refund of the 1917 overpayment which had been disallowed by improperly applying it to an invalid assessment of a deficiency tax for 1918." Also, rightly we think, that timely and proper claim for the overpayment for 1917 had been made as required by section 3226 Revised Statutes as reenacted 1926.

And we accept the conclusions stated in the following excerpt from its opinion—

"The certificate of overassessment issued by the Commissioner on July 27, 1926, disclosed an overpayment by the taxpayer of the 1917 tax of $91,570.34, of which the Commissioner ordered refunded to the taxpayer approximately $55,000, and on July 27, 1926, credited $34,555.68 to a deficiency tax for 1918. It cannot be said that the certificate of overassessment constituted an account stated between the government and the taxpayer, since the taxpayer refused to assent to the application of any part of the overpayment to a deficiency tax for 1918. To constitute an account stated there must be an agreement as to liability and the amount due. Goodrich, Admr. *v.* Coffin, 83 Me. 324. That the taxpayer's petition was not based on an allowance of an overpayment for 1917, and an implied promise by the government to refund, is equally clear, since the taxpayer refused to assent to the application of $34,555.68 to a deficiency tax of 1918. The application by the Commissioner on July 27, 1926, of a part of the overpayment for 1917 to a deficiency tax for 1918, against the protest of the taxpayer, constituted a disallowance of so much of the petitioner's original claim for refund. . . . The suit was one which could have been brought against a Collector, if living, but who is now dead or out of office."

Lowe Bros. Co. v. *United States,* 304 U. S. 302, 303, is not controlling. There the suit was begun in the District Court to recover an overpayment of 1917 taxes the alleged result of a credit made by the Commissioner from an admitted overpayment for 1918. For this no action could have been maintained against the collector—he did not make or authorize the credit. Therefore, the amendment to section 24(20) Judicial Code (28 U. S. C. A. sec. 41(20)) enlarging the jurisdiction of the District Court had no

---

years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates."

U. S. C. A. Title 26, sec. 1672-1673.

application. Here the collector might have been sued since he wrongly received payment on account of 1917 taxes. The present cause falls within the very words of the amendment.

No. 437.

Respondents overpaid internal revenue taxes in sums exceeding Ten Thousand Dollars for 1922, 1923 and 1924; and for 1925, $7,800. The Commissioner issued certificates to that effect August 16, 1933. He refused to repay these sums but undertook to credit them to deficiencies which he assessed against respondents for 1926, 1927, 1928.

Thereupon this suit was brought to recover the overpayments for 1922 to 1925 under section 24(20) Judicial Code as amended (U. S. C. A. Title 28, sec. 41(20)) which gives District Courts jurisdiction in respect of taxes erroneously received by a collector out of office. Respondents maintain that, in fact, there were no deficiencies for 1926, 1927, 1928, and that by attempting to credit overpayments for 1922 to 1925 against non-existing deficiencies the Commissioner in effect denied their claims for refund.

On the other hand petitioner insists, the Commissioner's action in allowing the overpayments and crediting them against alleged deficiencies amounted to payments on account of taxes assessed for 1926 to 1928. And, as it was the Commissioner and not the collector who caused such credit of overpayments to deficiencies, the District Court was without jurisdiction.

The Circuit Court of Appeals held the suit was one to recover overpayments admittedly made to the collector and in respect of which timely claims for refund had been filed.

It said—

"The crediting of the overpayments, by the Commissioner, against taxes due from the taxpayer for other years was a matter of defense, a justification for the failure to refund, and not a matter which destroyed the taxpayer's cause of action or ousted the court of jurisdiction."

This conclusion we think is correct. Other points suggested, so far as presently important, are sufficiently answered by what has been said in No. 416.

Both of the challenged judgments must be affirmed.

Mr. Justice REED took no part in the consideration or decision of either of these causes.